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# In the Supreme Court of the United States

SPECIAL JULY TERM, 1942

IN THE MATTERS OF THE APPLICATIONS OF ERNEST PETER BURGER, HERBERT HANS HAUPT, HEINRICH HARM HEINCK, EDWARD JOHN KERLING, HERMANN OTTO NEUBAUER, RICHARD QUIRIN, AND WERNER THIEL FOR WRITS OF HABEAS CORPUS

UNITED STATES EX. REL. ERNEST PETER BURGER, ET AL., PETITIONERS

*v.*

BRIG. GEN. ALBERT L. COX, U. S. A., PROVOST MARSHAL OF THE MILITARY DISTRICT OF WASHINGTON, RESPONDENT

## BRIEF FOR THE RESPONDENT

JULY 29, 1942

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UNITED STATES EX. REL. ERNEST PETER BURGER, ET AL., PETITIONERS

*v.*

BRIG. GEN. ALBERT L. COX, U. S. A., PROVOST MARSHAL OF THE MILITARY DISTRICT OF WASHINGTON, RESPONDENT

---

## BRIEF FOR THE RESPONDENT

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### QUESTIONS PRESENTED

(1) Whether the petitioners, as military prisoners charged with being enemies who crossed our lines in time of war for hostile purposes, can seek writs of habeas corpus from the civil courts.

(2) Whether the Military Commission, appointed July 2, 1942, to try the petitioners, has jurisdiction over the offenses charged.

(3) Whether the Military Commission has jurisdiction over the petitioners' persons.

(4) Whether the manner in which the Military Commission was appointed, or its conduct of the trial, deprived the petitioners of any rights to which they are entitled.

## CONSTITUTIONAL PROVISIONS, TREATIES, AND STATUTES INVOLVED

The Constitutional provisions, treaties, and statutes involved are set forth in Appendix I, *infra*, at pp. 63–71.

The President's Proclamation of July 2, 1942, and his precept of the same date creating the Military Commission read as follows:

### DENYING CERTAIN ENEMIES ACCESS TO THE COURTS OF THE UNITED STATES

---

### BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

### A PROCLAMATION

WHEREAS the safety of the United States demands that all enemies who have entered upon the territory of the United States as part of an invasion or predatory incursion,

or who have entered in order to commit sabotage, espionage or other hostile or warlike acts, should be promptly tried in accordance with the law of war;

NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America and Commander in Chief of the Army and Navy of the United States, by virtue of the authority vested in me by the Constitution and the statutes of the United States, do hereby proclaim that all persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States or any territory or possession thereof, through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals; and that such persons shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on their behalf, in the courts of the United States, or of its states, territories, and possessions, except under such regulations as the Attorney General, with the approval of the Secretary of War, may from time to time prescribe.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

DONE at the City of Washington this second day of July, in the year [SEAL] of our Lord nineteen hundred and forty-two, and of the Independence of the United States of America the one hundred and sixty-sixth.

FRANKLIN D. ROOSEVELT

By the President:
CORDELL HULL
*Secretary of State*

---

COMMANDER IN CHIEF OF THE ARMY AND NAVY

Washington, D. C.
JULY 2, 1942.

By virtue of the authority vested in me as President and as Commander in Chief of the Army and Navy, under the Constitution and statutes of the United States, and more particularly the Thirty-Eighth Article of War (U. S. C., title 10, sec. 1509), I, Franklin Delano Roosevelt do hereby appoint as a Military Commission the following persons:

Major General Frank R. McCoy, President
Major General Walter S. Grant
Major General Blanton Winship
Major General Lorenzo D. Gasser
Brigadier General Guy V. Henry
Brigadier General John T. Lewis
Brigadier General John T. Kennedy

The prosecution shall be conducted by the Attorney General and the Judge Advocate General. The defense counsel shall be Colonel Cassius M. Dowell and Colonel Kenneth Royall.

The Military Commission shall meet in Washington, D. C., on July 8th, 1942, or as soon thereafter as is practicable, to try for offenses against the law of war and the Articles of War, the following persons:

Ernest Peter Burger
George John Dasch
Herbert Hans Haupt
Henry Harm Heinck
Edward John Kerling
Hermann Otto Neubauer
Richard Quirin
Werner Thiel

The Commission shall have power to and shall, as occasion requires, make such rules for the conduct of the proceedings, consistent with the powers of military commissions under the Articles of War, as it shall deem necessary for a full and fair trial of the matters before it. Such evidence shall be admitted as would, in the opinion of the President of the Commission, have probative value to a reasonable man. The concurrence of at least two-thirds of the members of the Commission present shall be necessary for a conviction or sentence. The record of the trial, including any

judgment or sentence, shall be transmitted directly to me for my action thereon.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,
*July 2, 1942.*

### STATEMENT OF FACTS

The material facts are stated in respondent's Answer to the Petitions, submitted with this brief, and in the Stipulation between counsel for petitioners and counsel for respondent, submitted with this brief, stipulating that the facts stated in paragraphs 1 to 7, inclusive, of said Answer, are correct, and that other material facts recited in said Stipulation are correct.

The essential facts are as follows:

The seven petitioners are charged with being agents of the German Reich. All were born in Germany. All had lived in the United States for some period during their lives. All had returned to Germany between 1933 and 1941. After war was declared between the United States and the German Reich, the seven petitioners were recruited by an officer of the German High Command for training in a special school in the destruction of power lines, aluminum plants, bridges, railway and communication systems, and other key war facilities in the United States. They were also trained in the use of secret writing, for communication to Germany and among themselves in the United States.

Upon the conclusion of the training, the German Government contracted to pay them for acting on its behalf and transported them to the United States by submarines of the German Navy. Before boarding the submarines, the petitioners, and one George John Dasch, were separated into two groups of four each. One group went by submarine headed for Long Island. The other group went upon another submarine headed for Florida.

On the submarines, all wore fatigue uniforms of the German Marine Infantry, and were told that, if they were captured in these uniforms while landing, they would be treated as prisoners of war. If not captured immediately, they were to change to American-made civilian clothing.

Both submarines escaped our naval and other patrols and landed the petitioners under the cover of darkness. Three of the petitioners and Dasch landed in uniform near Amagansett, Long Island. The others landed in bathing trunks and uniform caps at Ponte Vedra, Florida.

Each group brought ashore boxes of explosives, incendiaries, fuses, detonators, and timing devices, and buried them in the sand near the points of landing.

Within two weeks after they landed, and while in civilian clothing, all seven petitioners and Dasch were taken into custody by special agents of the Federal Bureau of Investigation.

On July 2, 1942, the President set up a military commission to try the seven petitioners and Dasch for violation of the law of war and Articles 81 and 82 of the Articles of War (10 U. S. C. §§ 1553–4). On the same day, the President issued a proclamation denying access to the courts to certain enemies who crossed our fighting lines and were charged with committing or attempting to commit sabotage, espionage, or other hostile acts.

After the signing of the precept by the President, the Attorney General turned over the petitioners and Dasch to the military.

## SUMMARY OF ARGUMENT

The petitioners are not entitled to access to our courts for the purpose of obtaining writs of habeas corpus. The great bulwarks of our civil liberties—and the writ of habeas corpus is one of the most important—were never intended to apply in favor of armed invaders sent here by the enemy in time of war. A jealous regard for this prerogative writ has been and should be maintained, to prevent prosecution for political opinions, and possible abuses of military power in periods of great stress and high emotional feeling. But no such inroads will result from denying the privilege to belligerent enemies charged with breaking through our lines to commit hostile acts.

The petitioners are paid agents, acting for and under the orders of the German Reich—a country

with which we are at war. They came to this country on enemy warships, dressed in the uniforms of the German Marine Infantry, hoping by this strategem of war to be given the treatment of prisoners of war in the event of capture. They crossed through our patrols with the very end and object of destroying our most vital war production and war transportation facilities. They are enemies in as practical a sense as parachutists or invading armies landed from an enemy fleet, though because of the nature of their war offenses they are not entitled to the consideration due lawful belligerents.

Those whom the enemy sends to destroy our industries and lives and the very existence of the Nation can hardly be in a position to claim constitutional rights, privileges, and immunities from the Nation which they seek to destroy. One privilege they seek is the freedom to ask our courts to help them now that they are caught.

Traditionally, all States in time of war have denied belligerent enemies access to their courts. That is one of the earliest and most rudimentary forms of political and economic warfare. It is an integral part of modern total warfare. And today the nation that will not wage total war usually meets total defeat.

Even if these petitioners were entitled to access to our courts, to test the validity of their detention, this Court should find that they may legally be

tried by the Military Commission set up for that purpose by the President.

By no stretch of interpretation can the doctrine of *Ex Parte Milligan,* 4 Wall. 2 (1866), be applied to these proceedings. Milligan never wore the uniform of the armed forces at war with the United States. The petitioners did. Milligan was continuously a resident of Indiana. He did not cross through the lines and enter into a theatre of operations. The petitioners were residents of Germany, and as agents of the German Government crossed our lines secretly in enemy warships for the purpose of committing hostile acts.

Milligan was charged with the commission of military offenses at a time when invasions gave their slow fore-warning months in advance. In the year 1942, we have had concrete experience with the swiftness of modern warfare. Experience—which should be plain by now—has demonstrated that the theatres of operations which existed in 1864 are not the theatres of operations of 1942. Wars today are fought on the total front, on the battlefields of joined armies, on the battlefields of production, and on the battlefields of transportation and morale, by bombing, the sinking of ships, sabotage, spying, and propaganda.

Military orders setting up zones of operations are hardly necessary to attest the fact that the enemy submarines crossed our lines into a "theatre of operations". We know from the common fact

of sinkings of our merchant ships by submarines on our whole East Coast that our defenses are daily being pierced. We know that the two submarines were able to cross our lines and land these men on our patrolled shores. We know that our whole East Coast is a theatre of operations in substantially the same sense as the North Atlantic or the British Isles. The East Coast of today is a far cry from the Indiana of Milligan in 1864.

The Articles of War specifically provide that violations of those Articles and of the law of war by persons not members of our armed forces can be tried by military commissions. The President, under his oath to protect and defend the United States against its enemies, had the clear duty to meet force with force and to exercise his military authority to provide a speedy, certain and adequate answer, long prescribed by the law of war, to this attack on the safety of the United States by invading belligerent enemies. The Military Commission was his answer to this incursion.

These petitioners—as belligerent enemies—can be tried by the Military Commission and, by the same token, are not entitled to any constitutional right to a trial by jury or to the other similar rights which they assert. Under time-tested principles of our common law and the international law of war, their status as belligerent enemies, their purposes and their acts deprive them of the benefits which they now demand of the State which they sought

to destroy. In addition, the Constitution itself provides that, in cases arising in the land or naval forces, the normal constitutional guarantees do not apply. Our own soldiers and sailors can assert none of these guarantees when charged with military offenses. It would be fantastic to extend such privileges to invading soldiers of the enemy.

The history of military tribunals before the Constitution was adopted, the adoption of the Constitution with specific exception in such cases, and the passage by the Congress of the Articles of War, make it clear beyond a doubt that, in cases such as these, a trial by military commission is valid and proper.

Under the exercise of the President's powers as Commander in Chief, and by express statute, military commissions need not follow the procedure of courts-martial, nor need they give to belligerent enemies the rights which are afforded by statute to the members of our own armed forces, such as the right of peremptory challenge and the rule that the death sentence must be by unanimous decision. Rights and privileges accorded to our residents—including those who disagree with us—should not be granted to belligerent enemies who, in time of war, enter this country in order to destroy it by acts of war.

## ARGUMENT

### I

### THE PRISONERS ARE INVADING ENEMIES WITH NO PRIVILEGE TO PETITION FOR THE WRIT OF HABEAS CORPUS

The petitioners are enemies requesting this Court to invoke constitutional guarantees to protect them from speedy military punishment for the offenses with which they are charged. Some of the guarantees which they seek are not even available to our own soldiers. None of them is available to invading soldiers of the enemy.

The first of the "rights" upon which petitioners rely is the privilege of presenting a petition for habeas corpus to this Court.

These petitioners, as enemies who crossed our borders after the declaration of war, have no legal right to ask this Court, by habeas corpus or otherwise, to inquire into the lawfulness of their detention.

The President's proclamation of July 2, 1942, printed at page 2, *supra,* is an affirmation of a long-settled rule denying belligerent enemies any access to our courts. In support of this proclamation and its conclusive effect on these petitions, respondent contends:

A. Enemies who invade this country in time of war have no privilege to question their detention by habeas corpus.

B. In any event, whatever privilege may be accorded to such enemies is accorded by sufferance, and may be taken away by the President.

C. The prisoners fall squarely within the terms of the President's proclamation.

A. *Enemies who invade this country in time of war have no privilege to question their detention by habeas corpus.*

This contention is confined to enemies who invade this country after war begins. Its applicability to foreign nationals who are residents of this country, and have been since war began, need not be considered in passing upon these petitions.

The general nature of the writ of habeas corpus is thus described by Halsbury:

> The writ of *habeas corpus ad subjiciendum,* which is commonly known as the writ of *habeas corpus,* is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from unlawful or unjustifiable detention, whether in prison or in private custody. It is a prerogative writ by which the King has a right to inquire into the causes for which any of his subjects are deprived of their liberty. By it the High Court and the judges of that Court, at the instance of a subject aggrieved, command

> the production of that subject, and inquire into the cause of his imprisonment.—Halsbury's Laws of England (2d. Ed., Vol. IX, p. 701, par. 1200).

It will be noted that throughout this descriptive statement the privilege of the writ is said to be that of "subjects." It is ancient doctrine that in time of war enemies—persons who are subjects of a country with which we are at war, or who are subject to its orders, and who enter this country after war begins—are not entitled to these privileges and are not entitled to access to the courts.

Halsbury also points out that the writ of habeas corpus:

> * * * will not be granted * * * after conviction by a duly constituted court-martial the proceedings of which have been in due course confirmed by the competent authority; or to an alien enemy who is a prisoner of war; * * *—Halsbury's Laws of England (2d Ed., Vol. IX, p. 710, par. 1212).

The rule denying invaders the writ of habeas corpus is part of the historic and practical policy of denying certain enemies access to our courts. This broad policy has been relaxed in modern times in a very limited class of cases, to permit enemy nationals to have access to the courts in cases of civil litigation for the enforcement of pecuniary claims whenever the enemy nationals can be said to have been residing in the country with the license

of the sovereign authority. (See Blackstone, 21 Ed., Vol. 1, ch. 10, p. 372.)[6]

But the privilege of access to the courts even for the enforcement of pecuniary claims has been granted only to enemy nationals who are lawfully residents of this country. It has never been granted to an enemy who unlawfully enters the country after the declaration of hostilities and certainly not where there is reasonable cause to believe the illegal entry is for a hostile purpose. As said in *Sylvester's Case,* 7 Mod. 150 (1703):

> If an *alien enemy* come into *England* without the queen's protection, he shall be seized and imprisoned by the law of *England,* and he shall have no advantage of the law of *England,* nor for any wrong done to him here * * *.

In *Rex* v. *Knockaloe Camp Commandant,* 87 L. J. K. B. 43 (1917), Avery, J., wrote:

> In my opinion decisions whether or not persons are alien enemies for the purpose of determining their right to sue in our Courts are foreign to the point which is before us today. There is clear authority that a person who is an alien enemy prisoner of war is not entitled to apply to the

[6] A discussion of the origin of the rule and of the evolution of its change will be found in *Porter* v. *Freudenberg* [1915] 1 K. B. 857. See also *Clark* v. *Morey,* 10 Johns. (N. Y.) 69 (1813); 13 American Journal of International Law 35; 30 Geo. L. J. 421 (1942); 30 Calif. L. R. 358 (1942).

> Court for a writ of *habeas corpus.* (87 L. J. K. B., at 46.)

In *Rex* v. *Schiever,* 2 Burr. 765 (1759), *Furly* v. *Newnham,* 2 Doug. K. B. 419 (1780), and the *Three Spanish Sailors,* 2 W. B. 1324 (1779)—all decided before our own Constitution was adopted—it was held that no writ of habeas corpus will be granted for prisoners of war. To the same effect are *Rex* v. *The Superintendent of Vine Street Police Station* [1916] 1 K. B. 268, and *Schaffenius* v. *Goldberg* [1916] 1 K. B. 284, in which Lord Justice Warrington wrote:

> The authorities that have been cited to us with regard to prisoners of war in old times only go to this, that the prisoner of war could not sue out a writ of habeas corpus. Of course nobody now disputes that. ([1916] 1 K. B. 284, at 305.)

If prisoners of war are denied the privilege of requesting the writ of habeas corpus, it is inescapable that the seven petitioners are not entitled to request the writ. Under international law, they are not even entitled to treatment as prisoners of war. *Rules of Land Warfare* (U. S. General Staff, 1940) pars. 9, 70, 351, 352, 356. By removal of their uniforms before their capture these petitioners lost the possible advantages of being prisoners of war. Surely they did not thus acquire a privilege even prisoners of war do not have.

In January of this year this Court held that the incapacity of an enemy national or enemy government to sue in our courts deprived the Italian government or its ambassador of the privilege of the prerogative writs of prohibition and mandamus, even on application to the original jurisdiction of this Court. *Ex parte Colonna,* 314 U. S. 510 (1942).

In denying the petitioner's application, the Court, referring to the definition of "enemy" in Sec. 2 of the Trading With the Enemy Act and to the provisions of Sec. 7 (b) of that Act (Oct. 6, 1917, ch. 106 §§ 2, 7 (b); 40 Stat. 411, 416; 50 U. S. C. appendix, §§ 2, 7 (b)), said in a *per curiam* opinion:

> This provision was inserted in the Act in the light of the principle, recognized by Congress and by this Court, that war suspends the right of enemy plaintiffs to prosecute actions in our courts. * * * In view of the statute and the opinions in the cases cited, the application will not be entertained. * * * (314 U. S., at 511.)

It is to be noted that the privilege denied to Colonna was not the privilege to commence an ordinary lawsuit. Colonna sought the privilege of the prerogative writs of prohibition and mandamus. The writ of habeas corpus falls into the same class.

B. *In any event, whatever privilege may be accorded to such enemies is accorded by sufferance, and may be taken away by the President.*

It has been held by our courts that alien enemies—even those lawfully resident in this country

since war began—have no privilege of habeas corpus to inquire into the cause of their detention by the Government as dangerous persons. *Ex parte Graber,* 247 Fed. 882 (D. C. Ala. 1918); *Minotto* v. *Bradley,* 252 Fed. 600 (D. C. Ill. 1918). See also *Ex parte Weber,* [1916] 1 K. B. 280, affirmed in the House of Lords, [1916] 1 A. C. 421; *Rex* v. *Superintendent of Vine Street Police Station,* [1916] 1 K. B. 268; *Rex.* v. *Knockaloe Camp Commandant,* 87 L. J. K. B. N. S. 43 (1917); *Re Chamryk,* 25 Man. L. Rep. 50 (1914); *Re Beranek,* 33 Ont. L. Rep. 139 (1915); *Re Gottesman,* 41 Ont. L. Rep. 547 (1918); *Gusetu* v. *Date,* 17 Quebec Pr. 95 (1915).

But even if enemies lawfully resident here could assert this privilege, and even if these prisoners who came through the lines were regarded as in that category, the privilege is still one held by "license" of the Executive, and can be taken away at any time.

In *Rex* v. *Superintendent of Vine Street Police Station, supra,* [1916] 1 K. B., at p. 279, Low, J., after referring to the fact that the petitioner was in a position similar to that of an enemy resident in England under license from the crown, said:

> That license, however, can be terminated at any time by the Crown, and, although this point was not presented to us in the present case, I have little doubt that it might be successfully contended that the notice of internment given by the authority of the Secretary of State is a sufficient revocation of the license.

The similar authority of the President to take the license from lawful enemy residents is confirmed by the Act of July 6, 1798, now 50 U. S. C. § 21:

> Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized, in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject * * * and to establish any other regulations which are found necessary in the premises and for the public safety. (R. S. § 4067; Apr. 16, 1918, ch. 55, 40 Stat. 531.)

Speaking of this act, the court in *De Lacey* v. *United States*, 249 Fed. 625 (C. C. A. 9th, 1918) said:

> * * * although occasion has seldom arisen to enforce the statute, no question has been made of its constitutionality. While, as to property rights and life and liberty, all aliens domiciled in the United States, or temporarily therein, are accorded the equal protection of the law, and due process of law, such is not the case as to alien enemies. * * * There is nothing in the Constitution or laws of the United States which in any way has changed the common-law rule, or restricted the power of Congress to enact the alien enemy law. Power to enact such a law may at times be essential to the preservation of the government, and the right of all nations to exercise it is recognized in international law (p. 626).

The fact is that ordinary constitutional doctrines do not impede the Federal Government in its dealings with enemies. This principle was clearly stated by Chief Justice Marshall in *Brown* v. *United States,* 8 Cranch 110 (1814):

> Respecting the power of government no doubt is entertained. That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded (pp. 122–123).

The law has remained the same throughout the subsequent wars in which the United States has been engaged. *Miller* v. *United States,* 11 Wall. 268 (1871) (Civil War); *Juragua Iron Co.* v. *United States,* 212 U. S. 297 (1909) (Spanish-

American War); *De Lacey* v. *United States*, 249 Fed. 625 (C. C. A. 9th, 1918) (World War).

The President's power over enemies who enter this country in time of war, as armed invaders intending to commit hostile acts, must be absolute.

In his Proclamation of July 2, 1942, the President took the action he deemed necessary to deal with persons he and the armed forces under his command reasonably believe to be enemy invaders. He declared that all such persons should be subject to the law of war and triable by military tribunals. He removed whatever privilege such persons might otherwise have had to seek any remedy or maintain any proceeding in the courts of the United States.

These acts were clearly within his power as Commander in Chief and Chief Executive, and were lawful acts of the sovereign—the Government of the United States—in time of war.

C. *The prisoners are enemies who fall squarely within the terms of the President's proclamation.*

1. ALL OF THE PRISONERS ARE SUBJECTS, CITIZENS, OR RESIDENTS OF GERMANY, AND ENEMIES OF THE UNITED STATES

The prisoners admit that at all times between December 9, 1941, and May 26, 1942, they resided in Germany or in German-occupied territory.

Residents of Germany must after the declaration of war be regarded for most purposes—including the present—as enemies of the United

States. The Trading with the Enemy Act of 1917 is declaratory of this principle. Section 2 of that act includes within the definition of "enemy" for the purpose of that Act, "Any individual, partnership, or other body of individuals, *of any nationality,* resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war." (50 U. S. C., appendix, § 2; italics added.)

Section 7 (b) of the same Act then goes on to state:

> Nothing in this Act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or ally of enemy prior to the end of the war, except as provided in section ten hereof [which relates to patent, trade-mark, and copyright suits] * * * *And provided further,* That an enemy or ally of enemy may defend by counsel any suit in equity or action at law which may be brought against him. (50 U. S. C., appendix, § 7 (b).)

To whatever extent the President has power to bar enemies from seeking writs of *habeas corpus,* he clearly has power to define "enemy" as including a class as broad as that described in the Trading with the Enemy Act.

Even if it be assumed that Burger and Haupt are citizens of the United States, this does not change their status as "enemies" of the United States. Enemy character does not depend, in all

instances, upon citizenship. Any person, no matter what his nationality by ordinary peace-time standards, is considered to be an enemy if he willingly resides in the territory of the enemy nation and does not within a reasonable time make an effort to assert his non-enemy character. If he actively aids the enemy nation, and, *a fortiori,* if he undertakes belligerent actions on its behalf, he is impressed immediately with the character of an enemy. Hall, *International Law* (1909), pp. 490–497; Oppenheim, International Law (1940), Vol. II, pp. 216–218.

It has long been held by the courts of the United States that this rule applies to all persons living in enemy territory, even if they are technically United States citizens. The Supreme Court, in *The Venus,* 8 Cranch 253 (1814), approved the English rule that "whilst an Englishman, or a neutral, resides in a hostile country, he is a subject of that country, and is to be considered, (even by his own or native country, in the former case) as having a hostile character impressed upon him" (8 Cranch, at pp. 278–9). Discussing the position of such a person, Justice Washington said:

> It is contended that a native or naturalized subject of one country, who is surprised in the country where he was domiciled by a declaration of war, ought to have time to make his election to continue there, or to remove to the country to which he owes a permanent allegiance * * *. This doctrine is believed to be as unfounded in reason and

> justice, as it clearly is in law. * * * It is his duty to commit no acts of hostility against his native country, and to return to her assistance when required to do so; * * * (p. 283).

It has been the settled doctrine, since that case, that an American citizen may be treated as any other enemy of the United States, if he remains domiciled and at liberty in enemy territory after the outbreak of hostilities. *Miller* v. *United States,* 11 Wall. 268 (1871); *Juragua Iron Company* v. *United States,* 212 U. S. 297, 308 (1909). The return of Burger and Haupt to the United States cannot by any possibility be construed as an attempt to divest themselves of their enemy character by returning to the United States to reassume their duties as citizens. By their actions, they have placed themselves clearly and affirmatively in the category of enemies of the United States. Even if they have not lost their citizenship, therefore, they are entitled to no different treatment than any other enemy of this country.

If citizens merely residing abroad can be classified as enemies for purposes of access to the courts, certainly citizens residing abroad who act under the direct orders of a Government with which we are at war and come here by submarine through our lines to blow up our war facilities are enemies in the most realistic sense of the term.

The alleged American citizenship of Burger and Haupt is therefore irrelevant: all of the prisoners

are charged on reasonable grounds with being invading belligerent enemies of the United States, and are not entitled to access to our civil courts.

In any event, Burger and Haupt have forfeited any claim to American citizenship, for the reasons stated in Appendix IV of this brief.

2. THE PRISONERS DURING TIME OF WAR ENTERED THE UNITED STATES THROUGH COASTAL OR BOUNDARY DEFENSES

Three of the prisoners (Burger, Quirin, and Heinck) admit that they entered the United States near Amagansett, Long Island, on the night of June 12–13, 1942, after the declaration of war between the United States and Germany.

The remaining four (Kerling, Haupt, Neubauer, and Thiel) admit that they entered the United States near Ponte Vedra Beach, Florida, on the night of June 16–17, 1942, after the declaration of war between the United States and Germany.

It is conceded:

(a) That from June 12 through June 17, 1942, Amagansett and Ponte Vedra Beach were (and are) both within the Eastern Defense Command established by the United States Army of which fact public proclamation was made on May 16, 1942. (Stipulation, par. 8.)

(b) That on June 12–13, 1942, Amagansett was within the Eastern Sea Frontier and that on June 16–17, 1942, Ponte Vedra Beach was within the

Gulf Sea Frontier as established by the United States Navy. (Stipulation, par. 8.)

(c) That on June 12–13, 1942, the United States Coast Guard regularly patrolled the beaches surrounding Amagansett under written orders mentioning the purpose, *inter alia,* of detecting landings from enemy vessels. (Stipulation, par. 8.)

(d) That on June 16–17, 1942, the United States Army regularly patrolled the beaches surrounding Ponte Vedra Beach, Florida, under written orders mentioning the purpose, *inter alia,* of detecting enemy agents landing from submarines. (Stipulation, par. 8.)

### 3. THE PRISONERS ARE CHARGED WITH COMMITTING OR ATTEMPTING OR PREPARING TO COMMIT SABOTAGE, ESPIONAGE, HOSTILE, OR WARLIKE ACTS, OR VIOLATIONS OF THE LAW OF WAR

The Charges and Specifications placed before the Military Commission need not be elaborated here. They are attached as Exhibit E to each of the petitions, and are fully discussed in Appendix III of this brief.

The circumstances of this case abundantly establish that the military authorities had reasonable grounds for making the charges. The petitioners have admitted that they came here by German submarines, wore German naval uniforms until landing, brought boxes of explosives and other destructive implements ashore, had been trained and instructed to destroy American war facilities and to

communicate information to the enemy and to each other; to prevent apprehension, to get others to come here for similar work and otherwise to further their mission of destruction. Nothing but a plea of guilty could lay a more conclusive basis for the charges.

## II

### THE OFFENSES CHARGED AGAINST THESE PRISONERS ARE WITHIN THE JURISDICTION OF THIS MILITARY COMMISSION

Spies and other war offenders who cross our lines in time of war are triable before a military tribunal. This does not mean that they have not also committed offenses cognizable by the civil courts. It simply means that in time of war the trial of spies and similar offenders is a form of combat; it is not part of the recognized judicial system.

It has been the usage and custom of war since time immemorial for belligerents to establish military tribunals to deal swiftly and inexorably with spies and other war offenders. The principles and doctrines which these tribunals have invoked are part of the law of war, something entirely distinct from the civil law.

Some of the provisions of the law of war have been enacted by Congress into statutory form and are codified in the Articles of War (10 U. S. C., §§ 1471–1593a). Certain of the Articles

of War which codify the law of war apply to members of the military establishment and civilians alike, e. g., Articles 81 and 82 (10 U. S. C., §§ 1553–4). These statutes will be discussed at length in other parts of this brief.

But the law of war, like civil law, has a great *lex non scripta,* its own common law. This "common law of war" (*Ex parte Vallandigham,* 1 Wall. 243 (1863) at 249) is a centuries-old body of largely unwritten rules and principles of international law which governs the behavior of both soldiers and civilians during time of war. Winthrop, *Military Law and Precedents* (1920), 17, 41, 42, 773 ff.[6]

The law of war has always been applied in this country. During the Revolutionary War, when Major André of the British Army was apprehended behind the American lines wearing civilian clothes and bearing information concerning the

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[6] "Observance of the rules of International Law," says Spaight, "rests upon the conscience of each nation and the might of its arm. * * * If the laws of war are broken, there are three possible methods of obtaining satisfaction to be considered:—(1) The damaged belligerent may himself punish the offending enemy soldiers or nationals * * *.

"As to the case coming under (1) above, nothing need be said, except that the punishment of offenders, however manifest and grave their offence, should take place only after a fair trial—by a military court, a council of war, or whatever kind of courts has cognisance of offences against war law in each army; and that sentences of death should invariably be subject to the approval of the commander-in-chief."—Spaight, *War Rights on Land* (1911) 461–2.

defenses of the fort at West Point, a military court of inquiry found that the accused "ought to be considered as a spy from the enemy, and that, agreeable to the law and usage of nations, he ought to suffer death."[7]

The offense for which Major André was convicted—passing through our lines in civilian dress, with hostile purpose—is one of the most dangerous offenses known to the law of war. An enemy soldier in uniform can be recognized and dealt with; an enemy soldier disguised as one of our own civilians is a menace capable of incalculable harm. The other offenses here charged—appearing behind the lines in civilian guise, spying, relieving the enemy, and conspiracy—are of equal virulence and demand equally severe punishment.

For example, during the Civil War, a great number of similar offenses against the laws and usages of war, such as "coming within the lines of the army from the enemy without authority; * * * burning, destroying, or obstructing railroads, bridges, steamboats, etc., used in military operations; * * * conspiracy by two or more to violate the laws of war by destroying life or property in aid of the enemy," were tried and punished by military commissions.[8] *Digest of Opinions of Judge Advocate General,* Howland

[7] Proceedings published, Philadelphia, 1780; reprinted, Albany, 1865. Winthrop, *supra*, p. 518.

[8] "Offenses against the law of non-intercourse between the belligerents in time of war are no less such when committed

(1912), pp. 1070–1071. Cf. *Instruction for the Government of Armies of the United States in the Field* (G. O. 100, A. G. O. 1863) Sec. I, par. 13; Davis, *Military Law of the United States* (1913), p. 310.

The best definitions of the offenses against the common law of war charged here are contained in the Rules of Land Warfare (FM 27–10, War Department, 1940), published as an official text on the law of war, for the use of our Army, from which the following extracts are taken:

RULES OF LAND WARFARE

348. *Hostilities committed by individuals not of armed forces.*—Persons who take up arms and commit hostilities without having complied with the conditions prescribed by the laws of war for recognition as belligerents are, when captured by the injured party, liable to punishment as war criminals.

* * * * *

351. *Unauthorized belligerents.*—Men and bodies of men, who, without being lawful

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by foreigners than when committed by citizens. Thus where certain persons made their way early in the late war from Scotland to South Carolina, engaged for a considerable period in the manufacture of treasury notes for the Confederate authorities, and at the end of their employment came secretly and without authority into our lines with the design of returning to their home, *held* that, though British subjects, they had identified themselves with the cause of the enemy, and were properly amenable to trial for the offense of penetrating our military lines in violation of the laws of war. *Ibid.* (Dig. J. A. Gen.), 469, par. 4. See, also, pars. 5 and 6, *ibid.*" (Davis, *Military Law* (1913), p. 302, footnote).

belligerents as defined in paragraph 9, nevertheless commit hostile acts of any kind, are not entitled to the privileges of combatants. If captured, they have no right to be treated as prisoners of war. They may not, however, after being captured, be summarily put to death or otherwise punished, but may be brought to trial before a military commission or other tribunal, which may sentence them to death or such other punishment as it may consider proper.

352. *Armed prowlers.*—Armed prowlers, by whatever names they may be called, or persons of the enemy territory who steal within the lines of the hostile army for the purpose of robbing, killing, or of destroying bridges, roads, or canals, or of robbing, or destroying the mail, or of cutting the telegraph wires, are not entitled to be treated as prisoners of war.

These provisions have explicit congressional recognition under Article of War 15 (10 U. S. C. § 1486), which preserves the jurisdiction of military tribunals over all "offenses" and "offenders" punishable under "the law of war." Furthermore, the definition of *lawful* belligerents appearing in the Rules of Land Warfare (Rule 9) was adopted by the signatories to the Hague Convention in Article I, Annex to Hague Convention No. IV of Oct. 18, 1907, Treaty Series No. 539, and was ratified by the Senate of the United States. 36 Stat. 2295 (1911).* Our Government

*See Appendix I, *infra*.

has thus recognized the existence of a class of *unlawful* belligerents. These unlawful belligerents, under Article of War 15, are punishable under the common law of war.

From time immemorial, offenses of the sort here charged have been regarded as the province of military courts. About 1847, General Winfield Scott established the "military commission" and the "council of war" to try these offenses. During the Civil War, these tribunals were united into what has been known ever since as the "military commission." Trial by military commission is firmly established as proper under the law and usage of war. *Rules of Land Warfare, supra,* pars. 9, 351, 356; Davis, *supra,* pp. 307–310; Winthrop, *supra,* pp. 831 ff; Birkheimer, *Military Government and Martial Law* (1904), pp. 527 ff.

As this Court stated in *Ex parte Vallandigham,* 1 Wall. 243 (1863), at 249:

> * * * military jurisdiction is of two kinds. First, that which is conferred and defined by statute; second, that which is derived from the common law of war. "Military offences, under the statute, must be tried in the manner therein directed; but military offences, which do not come within the statute, must be tried and punished under the common law of war. The character of the courts which exercise these jurisdictions depends upon the local law of each particular county."

> In the armies of the United States, the first is exercised by courts martial, while cases which do not come within the "rules and regulations of war," or the jurisdiction conferred by statute or court martial, are tried by *military commissions.*

Military commissions in the United States derive their authority from the Constitution as well as statutes, military usage, and the common law of war. Article I of the Constitution empowers Congress to "declare War * * * and make Rules concerning Captures on Land and Water," to "make Rules for the Government and Regulation of the land and naval Forces," to "repel Invasions," to "define and punish * * * offences against the Law of Nations," and to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." By Article II, Section 2 (1), the President is made "Commander in Chief of the Army and Navy of the United States." These sections divide between Congress and the President control over all the many activities necessary to the effective prosecution of war. Divided though this power may be, there can be no question but that there is lodged in the two together, in the words of Chief Justice Hughes, the "power to wage war successfully." *Home Building and Loan Ass'n* v. *Blaisdell,* 290 U. S. 398, 426 (1934). In this case the powers of both the President and Congress are being exercised in harmony for that purpose.

Military commissions have been acknowledged by congressional statutes which have recognized them as courts of military law. Articles of War 15, 38, 8_, 82; 10 U. S. C. §§ 1486, 1509, 1553, 1554. Their authority has also been recognized in presidential proclamations and orders,[9] rulings of the courts,[10] and opinions of the Attorneys General.[11]

The offenses charged here [12] are unquestionably within the jurisdiction of military commissions.[13] The prisoners are charged with violating Articles of War 81 and 82 (10 U. S. C. §§ 1553–4) which specifically provide for trial by military commission. They are also charged with violating the common law of war in crossing our military lines and appearing behind our lines in civilian dress, with hostile purpose, and with conspiring to commit all the above violations, which in itself constitutes an additional violation of the laws of war. The jurisdiction of military commissions

[9] Proclamation of Pres. Lincoln, Sept. 24, 1862.

[10] *Ex parte Vallandigham*, 1 Wall. 243 (1863).

[11] 11 Ops. A. G. 297 (1865); 13 Id. 59 (1869); 14 Id. 249 (1873).

[12] An analysis of the charges and specifications appears in Appendix III of this brief.

[13] "Whenever a civilian citizen or alien is engaged in practices which directly interfere with waging war, which directly affect military movements and operations, and thus directly tend to hinder or destroy their successful result, and when, therefore, these practices are something more than mere seditious or traitorous designs or attempts against the existing civil government, the President as Commander

over these offenses under the law of war (in addition to the specific offenses codified in the Articles of War) is expressly recognized by Article of War 15 (10 U. S. C. § 1486).

It may be true that the hostile actions of these prisoners might authorize a prosecution for treason or espionage or sabotage under criminal statutes in *civil* courts. That fact does not, however, cast any doubt upon the congressional confirmation of the traditional jurisdiction of military tribunals to try such prisoners for offenses against the laws of war.[14] Where hostile conduct of the present type is involved, the military commission cannot be deprived of its jurisdiction merely because of the possibility of different, slower, and less certain punishment in the civil courts. This is the clear ruling of *Ex parte Mason,* 105 U. S. 696 (1881); *Grafton* v. *United States,* 206 U. S. 333 (1907); and *Ex parte Dunn,* 250 Fed. 871 (D. Mass. 1918). See also *United States* v. *McDonald,* 265 Fed. 754 (S. D. N. Y., 1920), *app. dismissed,* 256 U. S. 705 (1921).

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in Chief may treat this person as an enemy, and cause him to be arrested, tried, and punished in a military manner, although the civil courts are open, and although his offence may be sedition or treason, or perhaps may not be recognized as a crime by the civil code." (Pomeroy, *Constitutional Law* (10th ed. 1888) 597.)

[14] The Espionage Act of 1917 (50 U. S. C. § 38) expressly preserves the jurisdiction of military commissions under the Articles of War.

## III

### THE MILITARY COMMISSION HAS JURISDICTION OVER THE PERSONS OF THESE PRISONERS

Enemies and agents of the enemy who cross our battle lines for the purpose of committing espionage, sabotage, and other hostile acts may be tried by military commission without impairment of any of the safeguards of civil liberties contained in the United States Constitution.

The framers of the Constitution never intended that the protective mantle of the clauses guaranteeing "due process," "jury trial," and other such rights, should be used to cloak enemy violators of the law of war who seek to destroy the state from which they seek those "rights." The Fifth Amendment makes this clear in the following provision:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger * * *

The clause in this provision which excepts "cases arising in the land or naval forces" has always been regarded as a limitation on all the other clauses of the Bill of Rights. Even the majority and the minority judges in *Ex parte Milligan,* 4

Wall. 2, 123, 138–9 (1866)[15] were able to agree on this. By clear negative inference—never doubted and fortified by over a century of practice—such "cases" can be tried by summary military process, without "presentment or indictment of a Grand Jury."

Our own soldiers and sailors have no rights under the Fifth Amendment. It would be ridiculous to recognize such rights for the armed forces of the enemy.[16]

The offenses charged here arise in the land or naval forces. These prisoners are charged (1) with violating the law of war, by secretly passing through our military and naval lines for the purposes of committing various war crimes and (2) with violating Articles 81 and 82 of the Articles of War (10 U. S. C. §§ 1553–4).

The law of war which prohibits spying and other war crimes behind the lines is not confined to any particular class of person. Citizen and noncitizen, military and nonmilitary, are equally condemned. So also the Articles of War: Citizens as

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[15] *Ex Parte Milligan* is discussed at length at pp. 41–48, *infra*.

[16] Hamilton wrote in The Federalist (Dawson Ed. 1863) 587:

"I feel a deep and deliberate conviction that there are many cases in which trial by jury is an ineligible one. I think it is so particularly in cases which concern the public peace with foreign nations; that is, in most case where the question turns wholly on the Laws of Nations."

well as aliens (enemy or not) and civilians as well as soldiers are all within their scope. The Eighty-first Article uses the word "whosoever" and the Eighty-second extends to "any person," in specific statutory language. Indeed it was for the very purpose of trying *civilians* for war crimes that military commissions first came into use. Winthrop, *Military Law and Precedents* (1920) 831–841.

This broad comprehension of persons is well within the limits of the excepting clause of the Fifth Amendment. That clause reads "*cases* arising in the land or naval forces" and not *members* of the land or naval forces. It has been almost universally construed to include civilians. Wiener, *A Practical Manual of Martial Law* (1940), 137; Morgan, *Court-Martial Jurisdiction over Nonmilitary Persons under the Articles of War* (1920), 4 Minn. L. Rev. 79, 107; Winthrop, *Military Law and Precedents* (1920 ed.) 48, 767; Fletcher, *The Civilian and the War Power* (1918), 2 Minn. L. Rev. 110, 126; 16 Op. Atty. Gen. 292 (1879); *Ex parte Wildman,* 29 Fed. Cases 1232 (1876 D. C. Kan.). Such construction is founded in common sense: of all hostile acts, those by civilians are most dangerous and should be punished most severely.

The remaining question is the *territorial* extension of the common law of war and of Articles 81 and 82 to offenses such as are here charged.

By the law of war, war crimes can be committed anywhere "within the lines of a belligerent." Oppenheim's *International Law* (Lauterpacht's 6th ed. 1940) 457. Article 82 adds the all-inclusive phrase "or elsewhere" to its specification of "fortifications, posts, quarters, or encampments of any of the armies of the United States." Article 81 states no territorial limitations.

The full extent of the jurisdiction of military commissions to try civilians for offenses against the law of war need not now be decided. However narrow may be the territorial limits in which the law of war can be made to apply, there can be no question but that it applies to enemies who come through our lines for the purpose of committing war offenses behind our lines. Having violated the law of war in an area where it obviously applies, they are subject to trial by military tribunals wherever they may be apprehended. It is generally conceded that Congress may grant jurisdiction to try civilians for offenses which "occur in the theatre of war, in the theatre of operations, or in any place over which the military forces have actual control and jurisdiction." Morgan, *supra*, at 107; Wiener, *supra*, at 137.

Neither the Bill of Rights nor *Ex Parte Milligan*, 4 Wall. 2 (1866), grants to such persons constitutional guarantees which the Fifth Amendment expressly denies to our own soldiers. Such privileges are not for the benefit of the enemy's forces.

Civil process is not the privilege of prisoners of war. Still less is it the privilege of invading war offenders not entitled to the rights of prisoners of war.

No drastic revision of conventional concepts is needed here: These prisoners were in fact and purpose invaders without uniform and they brought with them the instruments of the destruction they intended. They were caught by fresh pursuit *in flagrante delicto.*

Constitutional protections which might be invoked to secure civil trial for United States residents who have not, during the war, left this country, and who have not become the secret agents of its enemies, cannot be construed to make the nation impotent against so bold and dangerous an attack.

## IV

## THE DECISION IN *EX PARTE MILLIGAN* HAS NO APPLICATION HERE

The prisoners rely on *Ex Parte Milligan*, 4 Wall. 2 (1866).

The actual decision in the *Milligan* case was an interpretation and application of a Congressional statute which had a limited life and long ago ceased to be controlling.

To facilitate the prosecution of the Civil War, Congress had exercised its constitutional power to suspend the privilege of the writ of habeas corpus. In the act suspending the privilege of the

writ (March 3, 1863, ch. 81; 12 Stat. 755), it was provided that the names of detained citizens, *other than prisoners of war,* should be filed with the courts at the places of their residence. If, thereafter, a grand jury should sit and fail to indict, the detained citizen should be discharged on order of the court. It was this legislation alone that required the decision rendered in the *Milligan* case.

Milligan was arrested by the military in Indiana, tried there before a military commission appointed by the military commander of the district of Indiana, and found guilty of conspiring against the United States, aiding rebels, inciting insurrection, engaging in disloyal practices, and violating the laws of war. He was sentenced to death, and the sentence was approved by the President.

More than sixty days after Milligan's arrest, the United States Circuit Court and the grand jury attendant upon it met in Indianapolis. The grand jury terminated its session without indicting Milligan. Thereupon, invoking the Act of March 3, 1863, Milligan, by a petition under the Act, which the Court treated as a habeas corpus petition, sought "to be delivered from military custody and imprisonment, and if found probably guilty of any offence, to be turned over to the proper tribunal for inquiry and punishment; or, if not found thus probably guilty, to be discharged altogether" (4 Wall. 135). The case came before the Supreme

Court upon a certificate of division from the judges of the Circuit Court for Indiana.

The point decided by the Supreme Court was that the effective congressional legislation then forbade a military trial of a civilian resident. The nine justices of the Supreme Court were unanimous upon this point. Mr. Chief Justice Chase said, at page 141:

> That body [Congress] did not see fit to authorize trials by military commission in Indiana, but by the strongest implication prohibited them.

If legislation prohibited a military trial, it was superfluous to consider whether legislation permitting it would have been constitutional. However, Mr. Justice Davis, speaking for five members of the Court, went on to state that if a statute *were* passed permitting trial of civilian residents by military commission, that statute would be unconstitutional.

He reasoned that the law of war was subject to the Constitution, that under the Fifth and Sixth Amendments no resident civilian citizen could ever be held for military trial and punishment so long as the courts were open, that the courts could never legally be closed except where martial law had been declared, based on an actual invasion rendering the courts incapable of performing their duties, and that Indiana had not been invaded in this sense.

Chief Justice Chase, on behalf of the four remaining justices, took vigorous exception to this position. He said:

> We think, therefore, that the power of Congress, in the government of the land and naval forces and of the militia, is not at all affected by the fifth or any other amendment. * * * And is it impossible to imagine cases in which citizens conspiring or attempting the destruction or great injury of the national forces may be subjected by Congress to military trial and punishment in the just exercise of this undoubted constitutional power? (p. 138–9).
>
> * * * * *
>
> [Congress] has, therefore, the power to provide by law for carrying on the war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of compaigns. That power and duty belong to the President as commander in chief (p. 139).
>
> * * * * *
>
> We cannot doubt that, in such a time of public danger, Congress had power, under the Constitution, to provide for the organization of a military commission, and for trial by that commission of persons engaged in this conspiracy. The fact that the Federal courts were open was regarded by Congress as a sufficient reason for not exer-

> cising the power; but that fact could not deprive Congress of the right to exercise it. Those courts might be open and undisturbed in the execution of their functions, and yet wholly incompetent to avert threatened danger, or to punish, with adequate promptitude and certainty, the guilty conspirators (p. 140–1).

Even the majority dictum in the *Milligan* case is distinguishable on the facts.

Milligan was a civilian; the present defendants are imprisoned combatants of an enemy nation. Milligan had been resident twenty years in the state of his domicile, he was "arrested while at his home" (4 Wall., at p. 118); the petitioners are belligerent enemies who were brought to this country in enemy war vessels and broke through our lines of defense. The majority in the *Milligan* case emphasized that Milligan was "not a resident of one of the rebellious states, or a prisoner of war" (4 Wall., at p. 118). These prisoners are residents of the enemy country, and are military captives of a type not even entitled to the treatment accorded to prisoners of war.

The *Milligan* case was decided in time of peace, after the problems of war were over. Bitterly received at the time it was first announced, the majority dictum in *Ex Parte Milligan* has been subjected to severe criticism. 2 Warren, *The Supreme Court in United States History* (1937) 418;

Corwin, *The President: Office and Powers* (2d ed. 1941) 165."

The time may now have come when the exigencies of a total and a global war must force a recognition that every foot of this country is within the "theatre of operations". Under modern conditions warfare by saboteurs and spies imperils the national safety just as much as warfare by tanks and submarines.

One District Court has been willing completely to revise the concept of "theatre of operations." In *United States v. McDonald*, 265 Fed. 754 (S. D. N. Y., 1920, appeal dismissed on stipulation, 256 U. S. 705 (1921), the court held that a German spy who was operating about the port of New York was sufficiently within the theatre of war to justify trial by naval court martial. The court said:

> Military authorities should have power to try spies wherever found; otherwise they may not be subject to trial for that offense. * * * The term "theatre of war," as used in the Milligan Case, apparently was intended to mean the territory of activity of conflict. With the progress made in ob-

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[17] Professor Burgess expresses the view that the dicta in the majority opinion could never stand "the strain of actual war." 1 Burgess, *Political Science and Comparative Constitutional Law* (1900) 248-252. And, certainly, "the doctrine of the majority in *Ex Parte Milligan* does not go far enough to meet the conditions of modern war." Fairman, *The Law of Martial Rule and the National Emergency* (1942), 55 Harv. L. Rev. 1254.

taining ways and means for devastation and destruction, the territory of the United States was certainly within the field of active operations. * * *

One of the lessons taught by this war is that the ocean is no longer a barrier for safety or an insurance against America's being involved in European wars. She cannot now become an asylum of safety for spies * * * (265 Fed. at 763–764).

Congress has prescribed that certain enemies and enemy agents charged with violating the laws of war in certain specific ways shall be tried by the most appropriate tribunal, a military commission. Accepting this Congressional mandate, the President has nominated a particular commission to try particular war offenders.

One does not have to argue that either the President or Congress, or both, can place *all* citizens *everywhere* under martial law to justify such limited and traditional procedure for securing the national safety. The test of whether or not the civil courts are open to punish civil crimes is too unrealistic a test to be applied blindly to all exercises of military jurisdiction.

"The necessity for martial rule arises," as Fairman writes,[18] "rather from the proximity of a danger than from the fact that the courts are closed." The "proximity of danger" may obviously be such as to require military jurisdiction of some war

[18] *Martial Rule* (1930) 147

offenders without necessarily requiring it for all citizens. How absurd it would be to suggest that the President as Commander-in-Chief must close all courts in order to secure the well-recognized right to mete out the traditional retribution of quick and certain military punishment to spies and other war offenders who succeed in invading our boundaries.[19]

## V

### THE JUDGMENT OF THE PRESIDENT AS TO WHAT CONSTITUTES NECESSITY FOR TRIAL BY MILITARY TRIBUNAL SHOULD NOT LIGHTLY BE DISREGARDED

Much wiser precedent for the conduct of war than *Ex parte Milligan* can be found in the *Prize Cases,* 2 Black 635 (1863), wherein Mr. Justice Grier said on behalf of the Supreme Court:

> If a war be made by invasion of a foreign nation, the President is not only authorized,

[19] Nor can any doubts about the validity of a military trial of these prisoners be found in the much-discussed case of *Pablo Waberski*, 31 Ops. A. G. 356 (1918). There the Attorney General several times emphasized—what he erroneously assumed to be fact—that Waberski "had not come through the fighting lines or field of military operations." Later when it was discovered that Waberski had come through such lines (from Mexico) and had "lurked" about military fortifications, a successor Attorney General issued a new opinion, as yet unpublished, that Waberski was subject to trial by military tribunal. Wiener, *supra*, at 140. The new opinion is printed in Appendix V to this brief.

but bound to resist force by force. (2 Black, at 668.)

In holding that the President had power to proclaim a blockade against United States citizens who were residents of the Southern states and, hence, to make lawful what would otherwise have been unlawful, to wit: the seizure of the property of such citizens on the high seas as enemy property, the Court announced:

> Whether the President in fulfilling his duties, as Commander-in-Chief, in suppressing an insurrection, has met with such hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him,* and this court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. "He must determine what degree of force the crisis demands." (2 Black, at 670.)

The English courts have not only long since rejected the doctrine of *Ex parte Milligan,* which they once accepted,[20] but also have recently sustained a wide discretion granted to the Executive for the detention of persons suspected of hostile associations. *Liversidge* v. *Anderson* [1942], 1 A. C. 206 (1941); *Greene* v. *Secretary of State for Home Affairs* [1942], 1 A. C. 284 (1941). In both

[20]Fairman, *The Law of Martial Rule and the National Emergency* (1942) 55 Harv. L. Rev. 1253, 1256.

cases, the House of Lords declined to inquire into the grounds for the Home Secretary's belief that it was "reasonable" to detain the prisoner. These decisions do not seem to have destroyed democracy in England. Carr, *A Regulated Liberty* (1942), 42 Col. L. Rev. 339.

In *Liversidge* v. *Anderson,* cited above, Liversidge, apparently a British subject, was incarcerated under the Defense (General) Regulations (1939), reg. 18B, par. 1, and brought a civil suit for damages. He filed a demand for a bill of the particulars of the causes of his detention, and the response to the demand was to the effect that the Home Secretary had reasonable cause to believe that Liversidge was a person "of hostile origin or associations", in the words of Regulation 18B, and that his detention was necessary to insure the public safety. The House of Lords, upon appeal, declined either to inquire into the sufficiency of the causes of detention or to require the disclosure demanded. The mere statement of the Home Secretary that he had "reasonable cause" to believe that the detention of Liversidge was necessary to the public safety was regarded as sufficient. In so deciding, the Court said:

> The purpose of the regulation is to ensure the public safety, and it is right so to interpret emergency legislation as to promote rather than to defeat its efficacy for the defence of the realm (p. 251–2).

* * * * *

> Even a judge may be allowed to take notice of the import of words like Fifth Columnists and Quislings and the like. It is the duty of the Secretary to check these underground and insidious activities of the enemy and their consequences, whether they result in sabotage or anti-British propaganda or in weakening the national effort and endurance (p. 265).

In *Greene* v. *Secretary for Home Affairs* [1942], 1 A. C. 284 (1941), the court reached the identical result on a petition for habeas corpus by Greene, a British subject.

Under our laws, too, the courts do not inquire into the Executive's determination on matters of the type here involved. The President's determination under the Act of 1795 of the "necessity" for calling out the militia was held conclusive in *Martin v. Mott*, 12 Wheat, 19 (1827). Cf. *United States* v. *George S. Bush & Co.*, 310 U. S. 371 (1940); *United States* v. *Curtiss-Wright Export Corporation*, 299 U. S. 304, 320 (1936); *Dakota Central Tel. Co.* v. *South Dakota*, 250 U. S. 163 (1919).

Even if it be assumed that the President's nomination of a military commission to try war criminals, as specified by Congress, must be tested by the "actual and present necessity" criterion of the majority opinion in the *Milligan* Case, this court will not review the President's judgment save in a case of grave and obvious abuse. Speaking for the Court in *Moyer* v. *Peabody*, 212 U. S.

78 (1909), which refused to inquire into the "necessity" for a declaration of martial law by the Governor of Colorado, Mr. Justice Holmes said:

> When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process. (212 U. S., at 85.)

Likewise, in *Sterling* v. *Constantin*, 287 U. S. 378 (1932), though the Court did inquire into the "necessity" for a declaration by the Governor of Texas, Chief Justice Hughes said:

> The nature of the power also necessarily implies that there is a permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order, for without such liberty to make immediate decisions, the power itself would be useless. Such measures, conceived in good faith, in the face of the emergency and directly related to the quelling of the disorder or the prevention of its continuance, fall within the discretion of the Executive in the exercise of his authority to maintain peace. (287 U. S., at 399–400.)

If so much discretion is allowed to the Governor of a State in policing industrial disputes, how much more should be allowed to the President in repelling foreign invasion.

To test the exercise of his discretion by the existence of the "visible disorder" mentioned in the *Milligan* case is no test at all where war is being waged by spies and saboteurs.

## VI

## THERE ARE NO TECHNICAL DEFECTS IN THE CREATION OF THE COMMISSION OR IN ITS ACTIONS

Petitioners' objections on this score are of three types:

A. That the Commission was improperly convened and constituted.

B. That the procedure and regulations prescribed for it by the President are unlawful.

C. That some of its actions have been illegal.

A. *The Commission was legally convened and constituted.*

Under Articles of War 8, 15 and 38 (10 U. S. C. §§ 1479, 1486, 1509), the President is authorized to appoint military commissions in respect of offenders or offenses that by statute or by the law of war are triable by such military commissions. Pursuant to the authority thus granted, he appointed this Military Commission by a precept dated July 2, 1942 (Exhibit A attached to the petitions).

The legality of the appointment of the members of this Military Commission has not been questioned. But the petitioners raise questions respecting the qualifications of the Attorney

General of the United States and of the Judge Advocate General to act as prosecutors, on the ground that their duties as prosecutors are inconsistent with other functions they are or may be required to perform in this case.

While no such conflicts of interest actually exist, it is not necessary even to inquire whether the Attorney General and the Judge Advocate General have inconsistent duties to perform. Military courts form no part of the judicial branch of the government. *Kurtz* v. *Moffitt,* 115 U. S. 487, 500 (1885). The judiciary will not examine into alleged conflicts of interest on the part of officers of military courts. *Keyes* v. *United States,* 109 U. S. 336 (1883) (in which officer acted as judge, prosecutor and witness).

B. *The Procedure and Regulations prescribed by the President are proper.*

Article 38 of the Articles of War (10 U. S. C. § 1509) provides that:

> The President may, by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions and other military tribunals, which regulations shall in so far as he shall deem practicable, apply the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States: *Provided,* That nothing contrary to or inconsistent with these articles shall be so prescribed * * *

The regulations established in the President's Order of July 2d are:

> The Commission shall have power to and shall, as occasion requires, make such rules for the conduct of the proceedings, consistent with the powers of Military Commissions under the Articles of War, as it shall deem necessary for a full and fair trial of the matters before it. Such evidence shall be admitted as would, in the opinion of the President of the Commission, have probative value to a reasonable man. The concurrence of at least two-thirds of the Members of the Commission present shall be necessary for a conviction or sentence. The record of the trial, including any judgment or sentence, shall be transmitted directly to me for my action thereon.

Petitioners challenge the regulations prescribed by the President as being "contrary to" or "inconsistent with" Articles of War 38, 43, 46, 50½, and 70 (10 U. S. C. §§ 1509, 1514, 1517, 1522, 1542).

The Articles of War (10 U. S. C. §§ 1471–1593a) refer at various places to many sorts of military tribunals, including courts-martial, military commissions, provost courts and courts of inquiry. However, the Articles deal primarily with courts-martial, their procedure, and the offenses cognizable therein.

Chapter II of the Articles of War, entitled "Courts Martial," includes Articles 3 through 53. These articles refer solely to courts-martial, their

constitution and procedure, except for certain articles expressly mentioning military commissions.

Article 38, as above quoted, gives the President power to prescribe additional rules of procedure for courts-martial. In conferring this rule-making power upon the President, Congress in the same sentence gave him the power to promulgate rules for *military commissions.* It then provided "That nothing contrary to or inconsistent with these articles shall be so prescribed." To the extent that the Article is applicable to the prescribing of rules for *military commissions,* Congress clearly was referring in the proviso only to those "articles" which expressly mention military commissions.

None of the procedural articles relied on by petitioners (except Article 38, considered below) expressly refers to military commissions. None of them is applicable here.

Petitioners' objections and the conclusive answers thereto follow:

1. The President's Order authorizes conviction by two-thirds vote, instead of by unanimous vote (Article of War 43).

Article of War 43, requiring unanimity for a death sentence, starts out by saying "No person shall, *by general court martial* [be sentenced to death by less than] all the members of said *court martial* present at the time * * *" [Italics added.]

2. No formal investigation of the charges was made at which the prisoners were given the right to cross-examine witnesses and present evidence (Article of War 70).

Article of War 70 provides in its second paragraph that no charge is to be referred to *a general court martial* for trial until a thorough and impartial investigation has been made. The legislative history of this section clearly indicates that it is confined to cases in which the charges were to be referred to a general court martial. It has no application to charges referred to a military commission. Prior to its amendment in 1937, the paragraph began with this sentence (41 Stat. 802):

> No charge *will be referred for trial* until after a thorough and impartial investigation thereof shall have been made. [Italics added.]

Since the amendment (50 Stat. 724), it reads:

> No charge *will be referred to a general court martial* for trial until after a thorough and impartial investigation thereof shall have been made. [Italics added.]

3. The President's Order is said to make improper provision for review (Articles of War 46, 50½).

Article 46 provides merely that "under such regulations as may be prescribed by the President," every record of trial by court martial or military commission which is received by "a reviewing or confirming authority" shall be referred by that

reviewing authority, before he acts thereon, to his staff judge advocate or to the Judge Advocate General.

It may be conceded that the President is a "reviewing or confirming authority." But he is also the President, with the power to prescribe the regulations under which references to judge advocate officers shall be made. In the present case, with his own Judge Advocate General acting by Presidential command as a prosecutor, it was particularly appropriate for the President to prescribe that the record be referred directly to the President for action. The President, as the supreme military authority, has the power to substitute his own review for review by his subordinate officers. No right of the prisoners could possibly be injured thereby.

Article 50½ prescribes the manner in which records *in certain types of cases* must be reviewed by a board of review established by the Judge Advocate General. But the present case is not included within those to which Article 50½ applies. Article 50½ applies only—

(a) to cases in which a *court martial* has imposed certain types of sentences; and

(b) to cases in which the President's approval of a sentence is *required* under Articles 46, 48 or 51.

Article 46 does not *require* review of any sentence imposed by a military commission. Article 48 refers only to courts martial. Article 51 applies only to cases where a sentence is suspended in the

discretion of an inferior officer in order to request review by the President.

It is further to be observed that the limitations argued in connection with Articles 46, 48 and 50½ are, for the purposes of these petitioners rendered practically without effect by the provision contained in Article 48 that where the authority (in this case, the President) competent to confirm the sentence has already acted as the approving authority (again, in this case, the President, as the appointing officer) no additional confirmation by him is necessary. And when no additional confirmation is necessary, review through a board of review is not required.

4. Petitioners' final objection to the procedure and regulations prescribed by the President is based on the clause in the precept of July 2, stating that the Commission "shall have power to and shall, as occasion requires, make such rules for the conduct of the proceedings, consistent with the powers of Military Commissions under the Articles of War, as it shall deem necessary for a full and fair trial of the matters before it."

This was not a complete delegation of rule-making power to the Commission, since the Order goes on to prescribe specific rules governing the admission of evidence, the vote necessary for sentence, and review. But even if it was, the petitioners were in no way harmed thereby. Practically every court in the land has the power to make its own rules for

the conduct of its proceedings. Military commissions are not more circumscribed, when they are authorized to prescribe rules by the President.

The doctrine of unconstitutional delegation of powers has no application here. That doctrine relates only to the improper transfer of powers from one of the three branches of the government to another. It has nothing to do with delegations by the Chief Executive to his military subordinates within the executive branch. Military courts "form no part of the judicial system of the United States." *Kurtz* v. *Moffitt*, 115 U. S. 487, 500 (1885).

C. *The Commission's actions have been lawful.*— Petitioners attack the actions of the Commission on a variety of grounds, ranging from its refusal to permit peremptory challenges[21] to its rulings on the admissibility and sufficiency of evidence.

None of these omnibus objections are cognizable by this Court. The writ of habeas corpus can only be used to question the jurisdiction of a military tribunal. It cannot be converted into a device for civil court review of nonjurisdictional error. *Ex parte Reed*, 100 U. S. 13 (1879); *Collins* v. *McDonald*, 258 U. S. 416 (1922); *Carter* v. *Roberts*, 177 U. S. 496 (1900); *Swaim* v. *United States*, 165 U. S. 553 (1897); *Johnson* v. *Sayre*, 158 U. S. 109 (1895); *United States* v. *Fletcher*, 148 U. S. 84 (1893); *Dynes* v. *Hoover*, 20 How. 65 (1858).

[21] Article of War 18, on which petitioners rely, permits peremptory challenge to each side in a trial by court-martial. It does not refer to military commissions.

In *Collins* v. *McDonald*, 258 U. S. 416 (1922), application for a writ of habeas corpus had been made by one who had been convicted by a court-martial. On appeal, the Supreme Court ruled that the petitioner was not entitled to the writ.

At page 418 the Court said:

> Thus, the question for decision here is, Does the petition show want of jurisdiction in the court martial over the person of the accused and over the offense with which he was charged and for which he was sentenced?

The Court found that the court martial had jurisdiction over both the person and the offense. It then considered the petitioner's contention that there had been insufficient and improperly admitted evidence. With respect to this, the Court said at page 420:

> It is also charged that there was no evidence of guilt before the court-martial other than the confession of the accused, which, it is averred, was made, under oath, to and at the instance of his superior officer, under duress, whereby it is alleged he was compelled to become a witness against himself in violation of the Constitution of the United States. This, in substance, is a conclusion of the pleader, unsupported by any reference to the record and, at most, was an error in the admission of testimony, which cannot be reviewed in a *habeas corpus* proceeding.

The opinion in the *Collins* case—backed by all of the decisions cited above—is conclusive on all of

petitioner's objections to the admissibility and sufficiency of the evidence.

### CONCLUSION

The United States and Nazi Germany are fighting a war to determine which of the two shall survive. This case is no more than a small skirmish, but on an important front. It is part of the business of war.

Military trial for the petitioners endangers no traditional civil liberty. These German soldiers have already been given rights which no American would receive in Germany, and now ask for "constitutional" privileges which we do not allow our own soldiers. Their applications for writs of habeas corpus should be denied.

Respectfully submitted.

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JULY 29, 1942.

# APPENDIX I

## CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES INVOLVED

### CONSTITUTION

Article I, Section 8:

The Congress shall have Power * * *

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

* * * * *

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

* * * * *

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article II, Section 1:

* * * * *

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or

affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect, and defend the Constitution of the United States."

Article II, Section 2:

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.

Article III, Section 2:

* * * * *

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and pub-

lic trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

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## TREATIES

### ANNEX TO THE HAGUE CONVENTION. 36 STAT. 2295 (1907, 1910)

### *Regulations respecting the laws and customs of war on land.*

#### SECTION I.—ON BELLIGERENTS

#### CHAPTER I.—*The qualifications of belligerents*

**Article 1:**

The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:—

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctiye emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army."

Article 29:

A person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.

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## STATUTES

### THE ARTICLES OF WAR

### (Title 10 U. S. C. § 1471–1593a)

Article 15 (§ 1486):

The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals. (June 4, 1920, ch. 227, subch. II, § 1, 41 Stat. 790.)

Article 18 (§ 1489):

Members of a general or special court-martial may be challenged by the accused or the trial judge advocate for cause stated to the court. The court shall determine the relevancy and validity thereof, and shall not receive a challenge to more than one member at a time. Challenges by the trial judge advocate shall ordinarily be presented and decided before those by the accused are offered. Each side shall be

entitled to one peremptory challenge; but the law member of the court shall not be challenged except for cause. (June 4, 1920, ch. 227, subch. II, § 1, 41 Stat. 790.)

Article 38 (§ 1509):

The President may, by regulations, which he may modify from time to time, prescrib the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals, which regulations shall insofar as he shall deem practicable, apply the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States: *Provided,* That nothing contrary to or inconsistent with these articles shall be so prescribed: *Provided further,* That all rules made in pursuance of this article shall be laid before the Congress annually. (June 4, 1920, ch. 227, subch. II, § 1, 41 Stat. 794.)

Article 43 (§ 1514):

No person shall by, general court-martial, be convicted of an offense for which the death penalty is made mandatory by law, nor sentenced to suffer death, except by the concurrence of all the members of said court-martial present at the time the vote is taken, and for an offense in these articles expressly made punishable by death; nor sentenced to life imprisonment, nor to confinement for more than ten years, except by the concurrence of three-fourths of all of the members present at the time the vote is taken. All other convictions and sentences, whether by general or special court-martial, may be determined by a two-thirds vote of those members present at the time the vote is taken. All other questions shall be de-

termined by a majority vote. (June 4, 1920, ch. 227, subch. II, § 1, 41 Stat. 795.)

Article 46 (§ 1517):

Under such regulations as may be prescribed by the President every record of trial by general court-martial or military commission received by a reviewing or confirming authority shall be referred by him, before he acts thereon, to his staff judge advocate or to the Judge Advocate General. No sentence of a court-martial shall be carried into execution until the same shall have been approved by the officer appointing the court or by the officer commanding for the time being. (June 4, 1920, ch. 227, subch. II, § 1, 41 Stat. 796.)

Article 50½ (§ 1522): Article 50½ is too long to justify quotation herein. It may be found at Title 50 U. S. C. § 1522.

Article 70. (§ 1542): Article 70 is too long to justify quotation herein. It may be found at Title 50 U. S. C. § 1542.

Article 81 (§ 1553):

Whosoever relieves or attempts to relieve the enemy with arms, ammunition, supplies, money, or other thing, or knowingly harbors or protects or holds correspondence with or gives intelligence to the enemy, either directly or indirectly, shall suffer death or such other punishment as a court-martial or military commission may direct. (June 4, 1920, ch. 227, subch. II § 1, 41 Stat. 804.)

Article 82 (§ 1554):

Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or

encampments of any of the armies of the United States, or elsewhere, shall be tried by a general court-martial or by a military commission, and shall, on conviction thereof, suffer death. (June 4, 1920, ch. 227, subch. II, § 1, 41 Stat. 804.)

ACT OF JULY 6, 1798, C. 66, SEC. 2, 1 STAT. 577

(Title 50, U. S. C., sec. 21)

The text of this section appears at page 20 of this brief.

TRADING WITH THE ENEMY ACT OF 1917

(Title 50, U. S. C., Appendix, sec. 1, *et seq.*)

Sec. 2. (a) Any individual, partnership, or other body of individuals of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory. * * *

* * * * * * *

Sec. 7. (b) * * * Nothing in this act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or ally of enemy prior to the end of the war, except as provided in section ten hereof (section 10 of this appendix): *Provided, however,* That an enemy or

ally of enemy licensed to do business under this act may prosecute and maintain any such suit or action so far as the same arises solely out of the business transacted within the United States under such license and so long as such license remains in full force and effect: *And provided further,* That an enemy or ally of enemy may defend by counsel any suit in equity or action at law which may be brought against him. * * *

NATIONALITY ACT OF 1940

(Title 8, U. S. C., sec. 801)

A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by: * * *

* * * * *

(b) Taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state; or

(c) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state; or

(d) Accepting, or performing the duties of, any office, post, or employment under the government of a foreign state or political subdivision thereof for which only nationals of such state are eligible; or

(e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory; or

(f) Making a formal renunciation of nationality before a diplomatic of consular officer of the

United States in a foreign state, in such form as may be prescribed by the Secretary of State; or

(g) Deserting the military or naval service of the United States in time of war, provided he is convicted thereof by a court martial; or

(h) Committing any act of treason against, or attempting by force to overthrow or bearing arms against the United States, provided he is convicted thereof by a court martial or by a court of competent jurisdiction. (Oct. 14, 1940, c. 876, title I, Subch. IV, sec. 401, 54 Stat. 1168.)

# APPENDIX II

## MILITARY TRIALS OF UNLAWFUL BELLIGERENTS: A HISTORICAL SURVEY

From the inception of our national history, it has been American practice, in time of war, to try unlawful belligerents before military tribunals. Some of the more notable instances of such trials are listed below.

### I. THE REVOLUTIONARY WAR

On September 21, 1776, Captain Nathan Hale of the Continental Army was apprehended behind the British lines on Long Island dressed in civilian clothes and bearing information concerning the British fortifications. Charged as a spy before a military court, he was found guilty and hung within twenty-four hours.

In May, 1777, John Brown, a civilian, was convicted by an American general court martial of corresponding with the enemy. 3 Journals of Congress 407.

In 1780 Major André of the British Army, apprehended behind the American lines wearing civilian clothes and bearing information concerning the defenses of the fort at West Point, was convicted as a spy by a military court of inquiry.

In the same year a civilian named Joshua Hett Smith was tried by court martial, under resolution of Congress, for assisting and conspiring with Benedict Arnold in his acts of treason.

### II. THE WAR OF 1812

Andrew Jackson frequently convened courts martial during the War of 1812, while he was in command of the American forces at New Orleans. Among the most well known of these instances were the cases of R. C. Ambrister and A. Arbuthnot, civilians, who were found guilty of inciting and aiding the Creek Indians to make war against the United States. American State Papers, Military Affairs, vol. I, pp. 721–734.

### III. THE MEXICAN WAR

On February 19, 1847, General Scott announced that certain acts committed by civilians or military persons in Mexico would be tried before two new types of military courts, the "military commission" and the "council of war." The following General Orders were issued by General Scott, convening these tribunals: Nos. 81, 83, 121, 124, 147, 171, 194, 215, 239, 267, 270, 273, 292, 334, 335, 380, 392 (1847); No. 9 (1848). General Taylor issued the following General Orders for the same purpose: Nos. 66, 106, 112, 121 (1847); and General Wool issued Orders 140, 179, 216, 463, 476, 514 (1847).

### IV. THE CIVIL WAR

During the Civil War the military commission and the council of war, as used by General Scott, were united into what has been known ever since as the "military commission."

The most notable use of the military commission arising out of the Civil War was the trial

of Mary Surratt, David E. Herold, Lewis Payne, George A. Atzerodt, Edward Spangler, Samuel A. Mudd, Samuel Arnold, and Michael O'Laughlin, for conspiracy in the assassination of Abraham Lincoln. *The Assassination of President Lincoln and the Trial of the Conspirators* (1865).

In 1865, G. St. Leger Grenfel and several associates were convicted of attempting to release confederate prisoners of war at Camp Douglass, near Chicago, and to lay waste and destroy the city of Chicago. G. O. 30, Northern Dept. (1865).

In September and December, 1864, John Y. Beall and certain others seized and destroyed steamers and their cargoes on Lake Erie and attempted to derail trains in New York State. Beall was thereafter sentenced to death by a military commission. G. O. 14, Dept. of the East (1865).)

Robert C. Kennedy was sentenced to death by a military commission in 1865 for having attempted to destroy New York City by setting fire to Barnum's Museum and ten hotels on the night of November 25, 1864. (G. O. 24, Dept. of the East (1865).)

Also sentenced to death by military commission for the seizure or destruction of steamboats, buildings, railroad facilities, telegraph lines and the like were Robert Louden (G. O. 41 of 1864) and William Murphy (G. C. M. O. 107 of 1866).

T. E. Hogg and six associates were convicted by a military commission in 1865 for trying to seize a United States merchant ship and its cargo on behalf of the Confederacy. (G. O. 52, Dept. of the Pacific (1865).)

Clement L. Vallandigham, a congressman from Ohio and head of the Sons of Liberty, was convicted by a military commission in 1863 for publicly expressing sympathy with the Confederacy. Vallandigham's appeal to the Supreme Court was denied. 1 Wall. 243 (1864).

Lambdin P. Milligan was convicted by military commission of conspiring against the United States Government, and was later released by writ of habeas corpus. 4 Wall. 2 (1866).

The General Orders issued during the Civil War contain nearly 150 cases of women tried by military commissions. During that War military commissions were employed in several thousand cases.

The principle offenses punished were:

> Unauthorized trading or commercial intercourse with the enemy; unauthorized correspondence with the enemy; blockade-running; mail-carrying across the lines; drawing a bill of exchange upon an enemy, or by an enemy upon a party in a northern city; dealing in, negotiation, or uttering Confederate securities or money; manufacturing arms, etc., for the enemy; furnishing to an enemy articles contraband of war; dealing in such articles in violation of military orders; publicly expressing hostility to the U. S. Government or sympathy with the enemy; coming within the lines of the army from the enemy without authority; violating a flag of truce; violation of an oath of allegiance, or of an amnesty oath; violation of parole by a prisoner of war; aiding prisoner of war to escape; unwarranted treatment of Federal prisoners of war; burning, destroying, or obstructing

railroads, bridges, steamboats, etc., used in military operations; cutting telegraph wires between military posts; recruiting for the enemy within the Federal lines; engaging in "guerrilla" or partisan warfare; assisting Federal soldiers to desert; resisting or obstructing an enrollment or draft; impeding enlistments; violating orders in regard to selling liquor to soldiers or other military orders of police in a district under military government; attempt without success to aid the enemy by transporting to him articles contraband of war; conspiracy by two or more to violate the laws of war by destroying life or property in aid of the enemy. *Digest of Opinions of the Judge Advocate General,* Howland (1912) 1071.

### V. POST CIVIL WAR

In 1873 certain members of the Modoc Indian tribe were convicted by military commission for treacherously killing Brigadier General Canby and Rev. E. Thomas during a truce. It is questionable whether the Indians who were engaged in armed warfare may be classified as civilians, but this case is at least authority on the use of a military commission for violation of the laws of war by enemies of the United States. G. C. M. O. 32 and 34 of 1873.

### VI. THE WORLD WAR

During the World War no occasion arose for the use of a military commission. Courts martial were, however, used to try German spies caught during 1917–1918. The most famous cases in-

volve a German naval officer named *Wessels,* and one *Pablo Waberski.* The former was convicted by a naval court martial of acting as a spy. *United States* v. *McDonald,* 265 Fed. 754 (S. D. N. Y., 1920), app. dismissed 256 U. S. 705 (1921). The latter was convicted by a military court martial for violating the 82nd Article of War. See Appendix V of this brief.

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These cases of military trials of unlawful belligerents will be found discussed in Winthrop, *Military Law and Precedents* (1920); Davis, *Military Law* (1913); and Birkheimer, *Military Government and Martial Law* (1904).

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## APPENDIX III

### ANALYSIS OF CHARGES AND SPECIFICATIONS

The charges and specifications preferred against the prisoners are set forth in full as Exhibit E to each of the petitions.

They are summarized below, with a statement of the applicable rules of law.

*Charge I—Specification 1.*—The gravamen of the specification is that, contrary to the law of war, each of the accused persons, acting for and on behalf of the German Reich, a foreign state with which the United States is at war, for the purpose of sabotaging one or more war industries or one or more war utilities or war materials within the United States, secretly passed through coastal military or naval lines or defenses of the United States and, in civilian dress, went within zones of military operations or elsewhere behind one or more of those lines or defenses.

(*a*) The Rules of Land Warfare specifically denounce such conduct as contrary to the laws of war. *Rules of Land Warfare* (1940), secs. 348, 351, 352. Section 351 reads as follows:

"Men and bodies of men, who, without being lawful belligerents as defined in paragraph 9, nevertheless commit hostile acts of any kind, are not entitled to the privileges of combatants. If captured, they have no right to be treated as prisoners of war. They may not, however, after being

captured, be summarily put to death or otherwise punished, but may be brought to trial before a military commission or other tribunal, which may sentence them to death or such other punishment as it may consider proper."

(*b*) Apart from the Rules of Land Warfare, such conduct has long been recognized as violative of the laws of war.

*Instructions for the Government of Armies of the United States in the Field,* G. O. 100, A. G. O. 1863, sec. 4, par. 4; sec. 5, pars. 15, 16.

Winthrop, *Military Law and Precedents,* (1920) 383–839.

(*c*) Persons who engage in such conduct are not lawful belligerents; if apprehended within our lines, they are not entitled to be treated as prisoners of war, but are subject to military trial as offenders against the laws of war.

*Rules of Land Warfare* (1940), sec. 351.

*Charge I—Specification 2.*—The specification alleges that, contrary to the law of war, each of the accused persons, acting for and on behalf of the German Reich, without being in the uniform of the armed forces thereof, for the purpose of sabotaging one or more war industries or one or more war utilities or war materials within the United States, appeared within zones of military operations or elsewhere behind one or more of the military or naval lines or defenses of the United States and there planned or attempted to accomplish the said purpose or there assembled together explosives or money or other supplies with which to accomplish the said purpose.

This specification differs from the first in that it speaks of *appearing behind the lines;* the first specification speaks of *crossing the lines.*

Appearance behind the lines within a zone of military operations and elsewhere for the purposes charged is punishable by a military commission.

*Rules of Land Warfare* (1940), sec. 351.
Risley, *The Law of War,* 108.
*Instructions for the Government of Armies of the United States in the Field,* G. O. 100, A. G. O. 1863, sec. 5, par. 16.
*United States* v. *McDonald,* 265 Fed. 754, 763 ff (S. D. N. Y., 1920), app. dismissed 256 U. S. 705 (1921).

*Charge II.*—The gravamen of the specification is that, contrary to the 81st Article of War, each of the accused persons (1) relieved or attempted to relieve the enemy either directly or indirectly with arms or ammunition or supplies or money or other thing, or (2) knowingly either directly or indirectly harbored or protected or held correspondence with or gave intelligence to the enemy, *in that* each of the accused persons, acting for and on behalf of the German Reich, without being in the uniform of the armed forces thereof, (a) relieved or attempted to relieve one or more others of the accused persons or the German Reich with explosives or money or other things for sabotaging one or more war industries or one or more transportation facilities or war materials of the United States, or (b) knowingly harbored or protected or communicated with or gave intelligence to one or more other of the accused persons or one or more other of the enemies of the United States.

Article 81 of the Articles of War reads:

> "Whosoever relieves or attempts to relieve the enemy with arms, ammunition, supplies, money, or other thing, or knowingly harbors or protects or holds correspondence with or gives intelligence to the enemy, either directly or indirectly, shall suffer death or such other punishment as a court-martial or military commission may direct." (10 U. S. C. § 1553.)

*Charge III.*—The specification alleges that, each of the accused persons was found in time of war lurking as a spy or acting as a spy, contrary to the 82nd Article of War, in or about a fortification or a post or quarters or an encampment of an army of the United States or elsewhere, *in that* each of the accused, acting for an on behalf of the German Reich, went, secretly and disguised in civilian clothes, about a fortification or a post or an encampment of an army of the United States, or in one or more zones of military operations or elsewhere, behind one or more of the coastal military or naval lines or defenses of the United States, for the purpose of acquiring intelligence relating to sabotage or to some other hostile act or acts which sabotage or hostile act or acts each intended should be committed by himself or by one or more other of the accused persons and for the purpose of communicating that intelligence to one or more others of the accused or to one or more other of the enemies of the United States or to the German Reich.

Article 82 of the Articles of War reads:

> "Any person who in time of war shall be found lurking or acting as a spy in or about

> any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be tried by a general court-martial or by a military commission, and shall, on conviction thereof, suffer death." (10 U. S. C. § 1554.)

Winthrop, *Military Law and Precedents* (1920), published by the United States Army, describes the proof necessary on a spying charge as follows on page 767:

> During the recent war [Civil War] the majority of the persons tried and convicted as spies were officers or soldiers of the enemy's army, who, in penetrating our lines, had abandoned their proper uniform for the dress of a civilian; and it was held that such an officer or soldier, discovered thus disguised, was in general to be treated, not as a prisoner of war, but as being *prima facie* a spy. This presumption, however, might—it was ruled—be rebutted by evidence that the party had come within the lines for a comparatively innocent purpose—as to visit his family; or, having been detained within the lines by being separated from his regiment, &c., on a retreat, had changed his dress merely to facilitate a return to the other side. In such a case indeed the clearest proof would properly be required before accepting the defense.
>
> But to be charged with the offense of the spy, it is not essential that the accused be a member of the Army or resident of the country of the enemy: He may be a citizen or even a soldier of the nation or people against whom he offends, and, at the time of his offence, legally within their lines.

> So he may either be an emissary of the enemy or one acting on his own accord.

Petitioners claim there is no evidence to support this charge. The sufficiency of the evidence is, however, a matter for the Military Commission. See Point VI, p. 61, *supra*. In view of the highly confidential nature of the abundant testimony on this subject, that evidence cannot be fully developed in this brief. If requested, respondent will hand up to the Court the supporting extracts from the record before the Commission, or the page references thereto.

*Charge IV.*—The gravamen of the specification is that, contrary to the law of war, each of the accused persons, acting for and on behalf of the German Reich, conspired with one or more of the accused persons or with some other enemy or enemies of the United States or with the German Reich, to commit one or more of the offenses specified in Charges I, II, and III.

> A conspiracy to commit an offense is itself an offense; this principle is a part of the laws of war.
>
> Howland, *Digest of Opinions of Judge Advocate General* (1912) 1071.
>
> Cf. *The Assassination of President Lincoln and the Trial of the Conspirators* (1865) 18, 248, and *passim*.

# APPENDIX IV

## Citizenship of Burger and Haupt

The alleged American citizenship of Burger and Haupt is irrelevant in determining the issues in this case. Citizens or not, their acts made them enemies of the United States in fact and law. Even if it be assumed that their citizenship is relevant, it may be clearly demonstrated that they have forfeited all claims to American citizenship.

### BURGER

Ernest Peter Burger was born in Germany in 1906. He entered the United States with a German passport on an immigration quota visa in 1927. He filed a declaration of intention to become a citizen later in that year. A certificate of citizenship was issued to him in 1933. Four or five months thereafter he returned to Germany with an American passport, and remained there until shortly before the commission of the offenses presently alleged against him.

Burger joined the German Army as a private on August 7, 1941, and at that time took an oath of loyalty to Hitler. By this act, he automatically forfeited his American citizenship under the provisions of U. S. Code, Title 8, Sec. 801 (b) and 801 (c). Sec. 801 (b) provides:

> A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> * * * * *
>
> (b) Taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state;

The oath of loyalty to Hitler, the Chancellor and President of the German Reich, and the Commander in Chief of its armed forces, constitutes the clear equivalent of an oath of allegiance to the German Reich.

Burger also lost his American nationality under Sec. 801 (c) by:

> (c) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state.

There was clearly no law of the United States expressly authorizing Burger's service in the armed forces of Germany, either as a soldier in the Army or as a saboteur and spy employed by the German High Command. Moreover, Burger was born in Germany, and under the repeatedly announced theory of that State, was considered to remain a German national, no matter where else he might claim to have established citizenship through naturalization. Thus under both sections (b) and (c), Burger has lost his citizenship status.

It should be pointed out also that under Sections 2 and 7 of the Act of March 2, 1907, 34 Stat. 1228–9 (former § 17 of U. S. C., title 8), continued in force under the Nationality Act of 1940 (54 Stat. 171, 8 U. S. C. § 809), there is a presumption that Burger has lost his citizenship by the fact of more than two years' residence in his native land. He has taken no steps to rebut this presumption in accordance with the provisions of the statute, but has rather indicated in his every act since returning to Germany, his decision to adhere and pay allegiance to the State of Germany. There can thus be no doubt that he is no longer a citizen of the United States.

HAUPT

Herbert Hans Haupt was born in Germany in 1919 (R. 1615). His father, also of German birth, came to this country in 1923 under an immigration visa (R. 1615). Herbert Haupt entered the United States with his mother in 1925 (R. 1615). His father became a naturalized citizen in 1930 (R. 1964). Under the naturalization law at that time (Act of March 2, 1907, c. 2534, 34 Stat. 1229), this conferred at least a presumption of citizenship upon Herbert Haupt.

Upon attaining his majority, no particular affirmative act by Haupt was needed to confirm his American citizenship. It is evident, however, that as a minor, subject to the control of his parents, he had no genuine opportunity of carrying out his own desires as regards citizenship. Therefore, when Haupt attained his majority, any affirmative acts which clearly and unmistakably

evidenced an intention of acting as a citizen of the State of his birth and of acting in allegiance to that State should be taken as a demonstration of his intention not to accept the citizenship status conferred upon him by his parents. There is clear proof of such acts.

Haupt remained in the United States until June 1941, at which time he went to Mexico. He sought to obtain an American passport for this trip but was not able to obtain one. He went to Mexico, he says, because of personal difficulties and because he wished to obtain work in Mexico or Nicaragua (R. 1966). After staying five or six weeks in Mexico, he attempted to obtain permission to go to Guatemala or Nicaragua, but was not able to obtain such permission. Not having ample funds and not being able to obtain work in Mexico he went to the German Consul in Mexico City for assistance. The consul advised him that he could obtain employment under German auspices in Japan. He thereupon sailed in July or August 1941 from Mexico to Japan, traveling on a Japanese vessel at the expense of the German Government, and carrying a German passport (R. 2021–8). After a short stay in Japan, he was given employment on a German vessel (R. 2028–9). He states that the destination was not revealed to him at the time he started service (R. 1973–4). At sea he transshipped to another German vessel, which ran the blockade and landed at Bordeaux, France, in December 1941. Haupt states that he was not told of the destination of this second vessel until he had been at sea on it for some days (R. 1973–4). Haupt proceeded from Bordeaux to Stettin, Ger-

many. He received the Iron Cross, second class, from the German Government for his service on the vessel, as he had been helpful in aiding it to run the blockade. He also received another decoration from the German Government at about the same time (R. 2031).

He states that he was not allowed to obtain gainful employment in Germany (R. 2037), and that when, sometime in March 1942, he was offered an opportunity to join the sabotage school maintained by Lieutenant Walter Kappe of the German High Command, he accepted the offer (R. 2048–50). He claims that he did so with the intention of coming back to the United States, and that he did not intend to go through with any attempts at sabotage in this country (R. 2066–89).

He stated that while on the submarine he decided to inform the American authorities about the mission of the eight accused and their arrival and whereabouts in this country (R. 2089). He landed on June 17, 1942, and proceeded to Chicago. On June 22, he called at the offices of the Federal Bureau of Investigation in Chicago and explained to them that he had not yet registered for the draft because he had been in Mexico for the past year (R. 2093). He admits that he lied in so stating, and that he did not tell the Bureau that he had been in Japan or Germany (R. 2094, 2125). He states he did not inform the Bureau about the mission of the eight accused at this time because he was nervous and afraid, and wanted to think things over (R. 2064–5). He stated that he intended to inform the Bureau after July 6, 1942, when Dasch and the petitioner Kerling were to meet in Chicago,

but he was apprehended by the Bureau on June 27, 1942 (R. 2066–72). He admits he saw at least six people in Chicago, including his father, mother, uncle, and aunt, all of whom knew he had just returned from Germany aboard a submarine with others, but admits he told none of them of his intention to inform the authorities (R. 2064, 2077, 2095–6, 2138–44).

The petitioner, Burger, testifying on his own behalf before the Military Commission, stated on cross examination that he was told by Lieutenant Walter Kappe of the German High Command, who recruited and supervised the training and departure of the eight accused, that each of the accused was assigned to a German Army unit before his departure (R. 2651–2, 2691–2).

Whatever his private reasons, Haupt did in fact enter a school conducted by the German High Command for the sole purpose of training men to sabotage the war efforts of the United States and her allies, and came over here with the other members of the sabotage group. He did nothing to inform the authorities about them. From this conduct and from the fact that he used a German passport in traveling from Mexico via Japan to Germany, it must be inferred that Haupt elected not to accept the status of American citizenship conferred upon him by his parents, but rather to renew his allegiance to his native land.

Even if it be assumed that Haupt did acquire more than a presumption of citizenship by the naturalization of his parents, he can be considered to have been a German citizen also under the constantly reiterated doctrine of that nation that all

members of the German race owe allegiance to the fatherland. While this in itself does not deprive him of American citizenship, affirmative acts on his part indicating his preference for his other nationality cannot be ignored. In such a situation of double citizenship, it is the general rule that "The child on attaining his majority, if the double claim has not sooner been dissolved, has a right to elect which of the two allegiances he will retain; and this election he is required to make." Moore, *International Law Digest,* 1906, vol. 3, p. 518; see also ibid., pp. 543–551. By his enemy acts since attaining majority, Haupt has shown which citizenship he has chosen to elect.

It is true that U. S. Code, Title 8, Sec. 808, provides that "The loss of nationality under this chapter shall result solely from the performance by a national of the acts or fulfillment of the conditions specified in this chapter." (Act 14, 1940, c. 876, Title I, subchap. IV, Sec. 408, 54 Stat. 1171.) It is submitted, however, that this provision applies only to the statutory methods set forth in the chapter containing the Nationality Act of 1940. There are other and nonstatutory ways in which a person may lose his American citizenship. *United States ex rel. Rojak* v. *Marshall,* 34 Fed. (2d) 219 (Dist. Ct. W. D. Pa. 1929); *United States ex rel. Scimeca* v. *Husband,* 6 Fed. (2d) 957 (C. C. A. 2d, 1925). Sec. 808, by its own terms, leaves them untouched.

These are not the only grounds for asserting that Haupt is not a citizen. He, equally with Burger, has lost his citizenship under the provisions of U. S. Code, Title 8, Sec. 801 (c). Although he

did not join the German Army, he has admitted that his status in Germany as a graduate of the sabotage school operated by the German High Command was the same as that of a soldier (R. 1625). Moreover, he was issued a special uniform (R. 1639), and was assigned to a unit in the German Army (R. 2651–2, 2691–2), facts clearly implying his membership in the German armed forces. The phrase "armed forces of a foreign state" could not have been intended to include only the traditional types of military forces. In a total war of destruction such as that in which Germany is now engaged, men such as Haupt constitute one of the most potent and dangerous forms of "armed forces." Surely the statute could not be construed to deprive a man of his citizenship for entering the regular army of another nation, and yet leave his status untouched when he enters into the military service of a foreign state in a capacity even more destructive and barbaric. As pointed out in the case of Burger, Haupt's birth in Germany gave him in German eyes a permanent German nationality. This and his entrance into a sabotage group under German military direction satisfy the requirements of the statute.

# APPENDIX V

## OPINION OF ATTORNEY GENERAL PALMER, DECEMBER 24, 1919, IN THE CASE OF PABLO WABERSKI

Hon. NEWTON D. BAKER,
*The Secretary of War,*
*Washington, D. C.*

SIR: I have the honor to respond to your request that I review the opinion rendered to the President by my predecessor, holding under the facts as they were then made known to him, that a court-martial was without jurisdiction to try Lather Witcke, alias Pablo Waberski, as a spy. It appears that my predecessor acted upon the assumption that Witcke, who came from Mexico, was a Russian National, and that he was arrested immediately upon setting foot on our territory. You now state that Witcke was a German citizen; had crossed into our territory at least three times within twenty-four hours, and was arrested in the town of Nogales about a mile distant from encampments where were stationed officers and men engaged in protecting the border against threatened invasion from the Mexican side.

In my judgment the above facts, coupled with the further fact that Witcke at the time of his arrest was found "lurking or acting as a spy," conferred jurisdiction upon a court-martial to try him under Article 82 of the Articles of War. Of

course, I do not undertake to determine whether the record evidence warranted his conviction.

This expression of my views should not be treated as overruling the opinion of my predecessor on the facts which were before him, but merely as holding that under the entirely different statement of facts you now submit the principles announced in that opinion have no application.

The circumstances attending this submission of my views lead me to request that they be treated as strictly confidential, and not made public.

The papers which accompanied your letter are herewith returned.

Respectfully.

(Signed) A. MITCHELL PALMER,
*Attorney General.*

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# SUPREME COURT OF THE UNITED STATES.

Nos. — Original and Nos. 1, 2, 3, 4, 5, 6 and 7—JULY SPECIAL TERM, 1942.

Ex parte Richard Quirin,
Ex parte Herbert Hans Haupt,
Ex parte Edward John Kerling,
Ex parte Ernest Peter Burger,
Ex parte Heinrich Harm Heinck,
Ex parte Werner Thiel,
Ex parte Herman Otto Neubauer.

Motions for leave to file petitions for writs of *habeas corpus*.

The United States of America, *ex rel.* Richard Quirin, Petitioner,
1 *vs.*
Brig. Gen. Albert L. Cox, U. S. A., Provost Marshal of the Military District of Washington.

The United States of America, *ex rel.* Herbert Hans Haupt, Petitioner,
2 *vs.*
Brig. Gen. Albert L. Cox, U. S. A., Provost Marshal of the Military District of Washington.

The United States of America, *ex rel.* Edward John Kerling, Petitioner,
3 *vs.*
Brig. Gen. Albert L. Cox, U. S. A., Provost Marshal of the Military District of Washington.

The United States of America, *ex rel.* Ernest Peter Burger, Petitioner,
4 *vs.*
Brig. Gen. Albert L. Cox, U. S. A., Provost Marshal of the Military District of Washington.

The United States of America, *ex rel.* Heinrich Harm Heinck, Petitioner,
5 *vs.*
Brig. Gen. Albert L. Cox, U. S. A., Provost Marshal of the Military District of Washington.

The United States of America, *ex rel.* Werner Thiel, Petitioner,
6 *vs.*
Brig. Gen. Albert L. Cox, U. S. A., Provost Marshal of the Military District of Washington.

The United States of America, *ex rel.* Herman Otto Neubauer, Petitioner,
7 *vs.*
Brig. Gen. Albert L. Cox, U. S. A., Provost Marshal of the Military District of Washington.

On writs of certiorari to the United States Court of Appeals for the District of Columbia.

[July 31, 1942.]

PER CURIAM.

In these causes motions for leave to file petitions for habeas corpus were presented to the United States District Court for the

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District of Columbia, which entered orders denying the motions. Motions for leave to file petitions for habeas corpus were then presented to this Court, and the merits of the applications were fully argued at the Special Term of Court convened on July 29, 1942. Counsel for petitioners subsequently filed a notice of appeal from the order of the District Court to the United States Court of Appeals for the District of Columbia, and they have perfected their appeals to that court. They have presented to this Court petitions for writs of certiorari before judgment of the United States Court of Appeals for the District of Columbia, pursuant to 28 U. S. C. § 347(a). The petitions are granted. In accordance with the stipulation between counsel for petitioners and for the respondent, the papers filed and argument had in connection with the applications for leave to file petitions for habeas corpus are made applicable to the certiorari proceedings.

The Court has fully considered the questions raised in these cases and thoroughly argued at the bar, and has reached its conclusion upon them. It now announces its decision and enters its judgment in each case, in advance of the preparation of a full opinion which necessarily will require a considerable period of time for its preparation and which, when prepared, will be filed with the Clerk.

The Court holds:

(1) That the charges preferred against petitioners on which they are being tried by military commission appointed by the order of the President of July 2, 1942, allege an offense or offenses which the President is authorized to order tried before a military commission.

(2) That the military commission was lawfully constituted.

(3) That petitioners are held in lawful custody, for trial before the military commission, and have not shown cause for being discharged by writ of habeas corpus.

The motions for leave to file petitions for writs of habeas corpus are denied.

The orders of the District Court are affirmed. The mandates are directed to issue forthwith.

Mr. Justice MURPHY took no part in the consideration or decision of these cases.

A true copy.

Test:

*Clerk, Supreme Court, U. S.*

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# SUPREME COURT OF THE UNITED STATES.

Nos. — Original and Nos. 1, 2, 3, 4, 5, 6 and 7—JULY SPECIAL TERM, 1942.

Ex parte Richard Quirin,
Ex parte Herbert Hans Haupt,
Ex parte Edward John Kerling,
Ex parte Ernest Peter Burger,
Ex parte Heinrich Harm Heinck,
Ex parte Werner Thiel,
Ex parte Herman Otto Neubauer.

Motions for leave to file petitions for writs of habeas corpus.

The United States of America, *ex rel.* Richard Quirin, Petitioner,
1 *vs.*
Brig. Gen. Albert L. Cox, U. S. A., Provost Marshal of the Military District of Washington.

The United States of America, *ex rel.* Herbert Hans Haupt, Petitioner,
2 *vs.*
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7 *vs.*
Brig. Gen. Albert L. Cox, U. S. A., Provost Marshal of the Military District of Washington.

On writs of certiorari to the United States Court of Appeals for the District of Columbia.

[October 29, 1942]

Mr. Chief Justice STONE delivered the opinion of the Court.

These cases are brought here by petitioners' several applications for leave to file petitions for habeas corpus in this Court, and by

their petitions for certiorari to review orders of the District Court for the District of Columbia, which denied their applications for leave to file petitions for habeas corpus in that court.

The question for decision is whether the detention of petitioners by respondent for trial by Military Commission, appointed by Order of the President of July 2, 1942, on charges preferred against them purporting to set out their violations of the law of war and of the Articles of War, is in conformity to the laws and Constitution of the United States.

After denial of their applications by the District Court, — F. Supp. —, petitioners asked leave to file petitions for habeas corpus in this Court. In view of the public importance of the questions raised by their petitions and of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty, and because in our opinion the public interest required that we consider and decide those questions without any avoidable delay, we directed that petitioners' applications be set down for full oral argument at a special term of this Court, convened on July 29, 1942. The applications for leave to file the petitions were presented in open court on that day and were heard on the petitions, the answers to them of respondent, a stipulation of facts by counsel, and the record of the testimony given before the Commission.

While the argument was proceeding before us, petitioners perfected their appeals from the orders of the District Court to the United States Court of Appeals for the District of Columbia and thereupon filed with this Court petitions for certiorari to the Court of Appeals before judgment, pursuant to Section 240(a) of the Judicial Code, 28 U. S. C. § 347(a). We granted certiorari before judgment for the reasons which moved us to convene the special term of Court. In accordance with the stipulation of counsel we treat the record, briefs and arguments in the habeas corpus proceedings in this Court as the record, briefs and arguments upon the writs of certiorari.

On July 31, 1942, after hearing argument of counsel and after full consideration of all questions raised, this Court affirmed the orders of the District Court and denied petitioners' applications for leave to file petitions for habeas corpus. By per curiam opinion we announced the decision of the Court, and that the full opinion in the causes would be prepared and filed with the Clerk.

The following facts appear from the petitions or are stipulated. Except as noted they are undisputed.

All the petitioners were born in Germany; all have lived in the United States. All returned to Germany between 1933 and 1941. All except petitioner Haupt are admittedly citizens of the German Reich, with which the United States is at war. Haupt came to this country with his parents when he was five years old; it is contended that he became a citizen of the United States by virtue of the naturalization of his parents during his minority and that he has not since lost his citizenship. The Government, however, takes the position that on attaining his majority he elected to maintain German allegiance and citizenship or in any case that he has by his conduct renounced or abandoned his United States citizenship. See *Perkins* v. *Elg*, 307 U. S. 325, 334; *United States ex rel. Rojak* v. *Marshall*, 34 F. 2d 219; *United States ex rel. Scimeca* v. *Husband*, 6 F. 2d 957, 958; 8 U. S. C. § 801, and compare 8 U. S. C. § 808. For reasons presently to be stated we do not find it necessary to resolve these contentions.

After the declaration of war between the United States and the German Reich, petitioners received training at a sabotage school near Berlin, Germany, where they were instructed in the use of explosives and in methods of secret writing. Thereafter petitioners, with a German citizen, Dasch, proceeded from Germany to a seaport in Occupied France, where petitioners Burger, Heinck and Quirin, together with Dasch, boarded a German submarine which proceeded across the Atlantic to Amagansett Beach on Long Island, New York. The four were there landed from the submarine in the hours of darkness, on or about June 13, 1942, carrying with them a supply of explosives, fuses and incendiary and timing devices. While landing they wore German Marine Infantry uniforms or parts of uniforms. Immediately after landing they buried their uniforms and the other articles mentioned and proceeded in civilian dress to New York City.

The remaining four petitioners at the same French port boarded another German submarine, which carried them across the Atlantic to Ponte Vedra Beach, Florida. On or about June 17, 1942, they came ashore during the hours of darkness wearing caps of the German Marine Infantry and carrying with them a supply of explosives, fuses, and incendiary and timing devices. They immediately buried their caps and the other articles mentioned and proceeded in civilian dress to Jacksonville, Florida,

and thence to various points in the United States. All were taken into custody in New York or Chicago by agents of the Federal Bureau of Investigation. All had received instructions in Germany from an officer of the German High Command to destroy war industries and war facilities in the United States, for which they or their relatives in Germany were to receive salary payments from the German Government. They also had been paid by the German Government during their course of training at the sabotage school and had received substantial sums in United States currency, which were in their possession when arrested. The currency had been handed to them by an officer of the German High Command, who had instructed them to wear their German uniforms while landing in the United States.[1]

The President, as President and Commander in Chief of the Army and Navy, by Order of July 2, 1942,[2] appointed a Military Commission and directed it to try petitioners for offenses against the law of war and the Articles of War, and prescribed regulations for the procedure on the trial and for review of the record of the trial and of any judgment or sentence of the Commission. On the same day, by Proclamation,[3] the President declared that "all persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States . . . through coastal or boundary defenses, and are charged with committing or attempt-

[1] From June 12 to June 18, 1942, Amagansett Beach, New York, and Ponte Vedra Beach, Florida, were within the area designated as the Eastern Defense Command of the United States Army, and subject to the provisions of a proclamation dated May 16, 1942, issued by Lieutenant General Hugh A. Drum, United States Army, Commanding General, Eastern Defense Command (see 7 Federal Register 3830). On the night of June 12-13, 1942, the waters around Amagansett Beach, Long Island, were within the area comprising the Eastern Sea Frontier, pursuant to the orders issued by Admiral Ernest J. King, Commander in Chief of the United States Fleet and Chief of Naval Operations. On the night of June 16-17, 1942, the waters around Ponte Vedra Beach, Florida, were within the area comprising the Gulf Sea Frontier, pursuant to similar orders.

On the night of June 12-13, 1942, members of the United States Coast Guard, unarmed, maintained a beach patrol along the beaches surrounding Amagansett, Long Island, under written orders mentioning the purpose of detecting landings. On the night of June 17-18, 1942, the United States Army maintained a patrol of the beaches surrounding and including Ponte Vedra Beach, Florida, under written orders mentioning the purpose of detecting the landing of enemy agents from submarines.

[2] 7 Federal Register 5103.

[3] 7 Federal Register 5101.

ing or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals".

The Proclamation also stated in terms that all such persons were denied access to the courts.

Pursuant to direction of the Attorney General, the Federal Bureau of Investigation surrendered custody of petitioners to respondent, Provost Marshal of the Military District of Washington, who was directed by the Secretary of War to receive and keep them in custody, and who thereafter held petitioners for trial before the Commission.

On July 3, 1942, the Judge Advocate General's Department of the Army prepared and lodged with the Commission the following charges against petitioners, supported by specifications:

1. Violation of the law of war.
2. Violation of Article 81 of the Articles of War, defining the offense of relieving or attempting to relieve, or corresponding with or giving intelligence to, the enemy.
3. Violation of Article 82, defining the offense of spying.
4. Conspiracy to commit the offenses alleged in charges 1, 2 and 3.

The Commission met on July 8, 1942, and proceeded with the trial, which continued in progress while the causes were pending in this Court. On July 27th, before petitioners' applications to the District Court, all the evidence for the prosecution and the defense had been taken by the Commission and the case had been closed except for arguments of counsel. It is conceded that ever since petitioners' arrest the state and federal courts in Florida, New York, and the District of Columbia, and in the states in which each of the petitioners was arrested or detained, have been open and functioning normally.

While it is the usual procedure on an application for a writ of habeas corpus in the federal courts for the court to issue the writ and on the return to hear and dispose of the case, it may without issuing the writ consider and determine whether the facts alleged by the petition, if proved, would warrant discharge of the prisoner. *Walker* v. *Johnston*, 312 U. S. 275, 284. Presentation of the petition for judicial action is the institution of a suit. Hence denial by the district court of leave to file the petitions in these causes was the judicial determination of a case or contro-

versy, reviewable on appeal to the Court of Appeals and reviewable here by certiorari. See *Ex parte Milligan*, 4 Wall. 2, 110-13; *Betts* v. *Brady*, decided June 1, 1942, pp. 2-4.

Petitioners' main contention is that the President is without any statutory or constitutional authority to order the petitioners to be tried by military tribunal for offenses with which they are charged; that in consequence they are entitled to be tried in the civil courts with the safeguards, including trial by jury, which the Fifth and Sixth Amendments guarantee to all persons charged in such courts with criminal offenses. In any case it is urged that the President's Order, in prescribing the procedure of the Commission and the method for review of its findings and sentence, and the proceedings of the Commission under the Order, conflict with Articles of War adopted by Congress—particularly Articles 38, 43, 46, 50½ and 70—and are illegal and void.

The Government challenges each of these propositions. But regardless of their merits, it also insists that petitioners must be denied access to the courts, both because they are enemy aliens or have entered our territory as enemy belligerents, and because the President's Proclamation undertakes in terms to deny such access to the class of persons defined by the Proclamation, which aptly describes the character and conduct of petitioners. It is urged that if they are enemy aliens or if the Proclamation has force no court may afford the petitioners a hearing. But there is certainly nothing in the Proclamation to preclude access to the courts for determining its applicability to the particular case. And neither the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission. As announced in our per curiam opinion we have resolved those questions by our conclusion that the Commission has jurisdiction to try the charge preferred against petitioners. There is therefore no occasion to decide contentions of the parties unrelated to this issue. We pass at once to the consideration of the basis of the Commission's authority.

We are not here concerned with any question of the guilt or innocence of petitioners.[4] Constitutional safeguards for the protection of all who are charged with offenses are not to be disre-

[4] As appears from the stipulation, a defense offered before the Military Commission was that petitioners had had no intention to obey the orders given them by the officer of the German High Command.

garded in order to inflict merited punishment on some who are guilty. *Ex parte Milligan, supra,* 119, 132; *Tumey* v. *Ohio,* 273 U. S. 510, 535; *Hill* v. *Texas,* decided June 1, 1942, p. 5. But the detention and trial of petitioners—ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger—are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress consitutionally enacted.

Congress and the President, like the courts, possess no power not derived from the Constitution. But one of the objects of the Constitution, as declared by its preamble, is to "provide for the common defence". As a means to that end the Constitution gives to Congress the power to "provide for the common Defence", Art. I, § 8, cl. 1; "To raise and support Armies", "To provide and maintain a Navy", Art. I, § 8, cl. 12, 13; and "To make Rules for the Government and Regulation of the land and naval Forces", Art. I, § 8, cl. 14. Congress is given authority "To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water", Art. I, § 8, cl. 11; and "To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations", Art. I, § 8, cl. 10. And finally the Constitution authorizes Congress "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Art. I, § 8, cl. 18.

The Constitution confers on the President the "executive Power", Art. II, §1, cl. 1, and imposes on him the duty to "take Care that the Laws be faithfully executed". Art. II, § 3. It makes him the Commander in Chief of the Army and Navy, Art. II, § 2, cl. 1, and empowers him to appoint and commission officers of the United States. Art. II, § 3, cl. 1.

The Constitution thus invests the President as Commander in Chief with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offences against the law of nations, including those which pertain to the conduct of war.

By the Articles of War, 10 U. S. C. §§ 1471-1593, Congress has provided rules for the government of the Army. It has provided

for the trial and punishment, by courts martial, of violations of the Articles by members of the armed forces and by specified classes of persons associated or serving with the Army. Arts. 1, 2. But the Articles also recognize the "military commission" appointed by military command as an appropriate tribunal for the trial and punishment of offenses against the law of war not ordinarily tried by court martial. See Arts. 12, 15. Articles 38 and 46 authorize the President, with certain limitations, to prescribe the procedure for military commissions. Articles 81 and 82 authorize trial, either by court martial or military commission, of those charged with relieving, harboring or corresponding with the enemy and those charged with spying. And Article 15 declares that "the provisions of these articles conferring jurisdiction upon courts martial shall not be construed as depriving military commissions . . . or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions . . . or other military tribunals". Article 2 includes among those persons subject to military law the personnel of our own military establishment. But this, as Article 12 provides, does not exclude from that class "any other person who by the law of war is subject to trial by military tribunals" and who under Article 12 may be tried by court martial or under Article 15 by military commission.

Similarly the Espionage Act of 1917, which authorizes trial in the district courts of certain offenses that tend to interfere with the prosecution of war, provides that nothing contained in the act "shall be deemed to limit the jurisdiction of the general courts-martial, military commissions or naval courts-martial". 50 U. S. C. § 38.

From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals.[5] By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that mili-

[5] Talbot v. Janson, 3 Dall. 133, 153, 159-61; Talbot v. Seeman, 1 Cranch 1, 40-41; Maley v. Shattuck, 3 Cranch 458, 488; Fitzsimmons v. Newport Ins. Co., 4 Cranch 185, 199; The Rapid, 8 Cranch 155, 159-64; The St. Lawrence, 9 Cranch 120, 122; Thirty Hogsheads of Sugar v. Boyle, 9 Cranch 191, 197-98; The Anne, 3 Wheat. 435, 447-48; United States v. Reading, 18 How. 1, 10; Prize Cases, 2 Black 635, 666-67, 687; The Venice, 2 Wall. 258, 274; The William Bagaley, 5 Wall. 377; Miller v. United States, 11 Wall. 268; Coleman v. Tennessee, 97 U. S. 509, 517; United States v. Pacific R. R., 120 U. S. 227, 233; Juragua Iron Co. v. United States, 212 U. S. 297.

tary tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. Congress, in addition to making rules for the government of our Armed Forces, has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons and offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals. And the President, as Commander in Chief, by his Proclamation in time of war has invoked that law. By his Order creating the present Commission he has undertaken to exercise the authority conferred upon him by Congress, and also such authority as the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war.

An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war. It is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation. For here Congress has authorized trial of offenses against the law of war before such commissions. We are concerned only with the question whether it is within the constitutional power of the national government to place petitioners upon trial before a militaly commission for the offenses with which they are charged. We must therefore first inquire whether any of the acts charged is an offense against the law of war cognizable before a military tribunal, and if so whether the Constitution prohibits the trial. We may assume that there are acts regarded in other countries, or by some writers on international law, as offenses against the law of war which would not be triable by military tribunal here, either because they are not recognized by our courts as violations of the law of war or because they are of that class of offenses constitutionally triable only by a jury. It was upon such grounds that the Court denied the right to proceed by military tribunal in *Ex parte Milligan, supra*. But as we shall show, these petitioners were charged with an offense against the law of war which the Constitution does not require to be tried by jury.

It is no objection that Congress in providing for the trial of such offenses has not itself undertaken to codify that branch of international law or to mark its precise boundaries, or to enumerate or define by statute all the acts which that law condemns. An Act of Congress punishing "the crime of piracy, as defined by the law of nations" is an appropriate exercise of its constitutional authority, Art. I, § 8, cl. 10, "to define and punish" the offense since it has adopted by reference the sufficiently precise definition of international law. *United States* v. *Smith*, 5 Wheat. 153; see *The Marianna Flora*, 11 Wheat. 1, 40-41; *United States* v. *Brig Malek Adhel*, 2 How. 210, 232; *The Ambrose Light*, 25 Fed. 408, 423-28; 18 U. S. C. § 481.[6] Similarly by the reference in the 15th Article of War to "offenders or offenses that . . . by the law of war may be triable by such military commissions", Congress has incorporated by reference, as within the jurisdiction of military commissions, all offenses which are defined as such by the law of war (compare *Dynes* v. *Hoover*, 20 How. 65, 82), and which may constitutionally be included within that jurisdiction. Congress had the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts. It chose the latter course.

By universal agreement and practice the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations[7] and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces.

[6] Compare 28 U. S. C. § 41(17), conferring on the federal courts jurisdiction over suits brought by an alien for a tort "in violation of the laws of nations"; 28 U. S. C. § 341, conferring upon the Supreme Court such jurisdiction of suits against ambassadors as a court of law can have "consistently with the law of nations"; 28 U. S. C. § 462, regulating the issuance of habeas corpus where the prisoner claims some right, privilege or exemption under the order of a foreign state, "the validity and effect whereof depend upon the law of nations"; 15 U. S. C. §§ 606(b) and 713(b), authorizing certain loans to foreign governments, provided that "no such loans shall be made in violation of international law as interpreted by the Department of State."

[7] Hague Convention No. IV of October 18, 1907, 36 Stat. 2295, Article I of the Annex to which defines the persons to whom belligerent rights and duties attach, was signed by 44 nations. See also Great Britain, War Office, Manual of Military Law (1929) ch. xiv, §§ 17-19; German General Staff, Kriegsbrauch im Landkriege (1902) ch. 1; 7 Moore, Digest of International Law, § 1109; 2 Hyde, International Law (1922) § 653-54; 2 Oppenheim, International Law (6th ed. 1940) § 107; Bluntschli, Droit International (5th ed. tr. Lardy) §§ 531-32; 4 Calvo, Le Droit International Theorique et Pratique (5th ed. 1896) §§ 2034-35.

Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.[8] The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals. See Winthrop, Military Law, 2d ed., pp. 1196-97, 1219-21; Instructions for the Government of Armies of the United States in the Field, approved by the President, General Order No. 100, April 24, 1863, sections IV and V.

Such was the practice of our own military authorities before the adoption of the Constitution,[9] and during the Mexican and Civil Wars.[10]

Paragraph 83 of General Order No. 100 of April 24, 1863, directed that: "Scouts or single soldiers, if disguised in the dress of the country, or in the uniform of the army hostile to their own, employed in obtaining information, if found within or lurking about the lines of the captor, are treated as spies, and suffer death." And Paragraph 84, that "Armed prowlers, by whatever names they may

[8] Great Britain, War Office, Manual of Military Law, ch. xiv, §§ 445-451; Regolamento di Servizio in Guerra, § 133, 3 Leggi e Decreti del Regno d'Italia (1896) 3184; 7 Moore, Digest of International Law, § 1109; 2 Hyde, International Law, §§ 654, 652; 2 Halleck, International Law (4th ed. 1908) § 4; 2 Oppenheim, International Law, § 254; Hall, International Law, §§ 127, 135; Baty & Morgan, War, Its Conduct and Legal Results (1915) 172; Bluntschli, Droit International, §§ 570 bis.

[9] On September 29, 1780, Major John Andre, Adjutant-General to the British Army, was tried by a "Board of General Officers" appointed by General Washington, on a charge that he had come within the lines for an interview with General Benedict Arnold and had been captured while in disguise and travelling under an assumed name. The Board found that the facts charged were true, and that when captured Major Andre had in his possession papers containing intelligence for the enemy, and reported their conclusion that "Major Andre . . . ought to be considered as a Spy from the enemy, and that agreeably to the law and usage of nations . . . he ought to suffer death." Major Andre was hanged on October 2, 1780. Proceedings of a Board of General Officers Respecting Major John Andre, Sept. 29, 1780, printed at Philadelphia in 1780.

[10] During the Mexican War military commissions were created in a large number of instances for the trial of various offenses. See General Orders cited in 2 Winthrop, Military Law (2d ed. 1896) p. 1298, note 1.

During the Civil War the military commission was extensively used for the

be called, or persons of the enemy's territory, who steal within the lines of the hostile army for the purpose of robbing, killing, or of destroying bridges, roads, or canals, or of robbing or destroying the mail, or of cutting the telegraph wires, are not entitled to the privileges of the prisoner of war."[11] These and related pro-

trial of offenses against the law of war. Among the more significant cases for present purposes are the following:

On May 22, 1865, T. E. Hogg and others were tried by a Military Commission, for "violations of the laws and usages of civilized war", the specifications charging that the accused "being commissioned, enrolled, enlisted or engaged" by the Confederate Government, came on board a United States merchant steamer in the port of Panama "in the guise of peaceful passengers" with the purpose of capturing the vessel and converting her into a Confederate cruiser. The Commission found the accused guilty and sentenced them to be hanged. The reviewing authority affirmed the judgments, writing an extensive opinion on the question whether violations of the law of war were alleged, but modified the sentences to imprisonment for life and for various periods of years. Dept. of the Pacific, G. O. No. 52, June 27, 1865.

On January 17, 1865, John Y. Beall was tried by a military commission for "violation of the laws of war". The opinion by the reviewing authority reveals that Beall, holding a commission in the Confederate Navy, came on board a merchant vessel at a Canadian port in civilian dress and, with associates, took possession of the vessel in Lake Erie; that, also in disguise, he unsuccessfully attempted to derail a train in New York State, and to obtain military information. His conviction by the Commission was affirmed on the ground that he was both a spy and a "guerrilla", and he was sentenced to be hanged. Dept. of the East, G. O. No. 14, Feb. 14, 1865.

On January 17, 1865, Robert C. Kennedy, a Captain of the Confederate Army, who was shown to have attempted, while in disguise, to set fire to the City of New York, and to have been seen in disguise in various parts of New York State, was convicted on charges of acting as a spy and violation of the law of war "in undertaking to carry on irregular and unlawful warfare". He was sentenced to be hanged, and the sentence was confirmed by the reviewing authority. Dept. of the East, G. O. No. 24, March 20, 1865.

On September 19, 1865, William Murphy, "a rebel emissary in the employ of and colleagued with rebel enemies" was convicted by a military commission of "violation of the laws and customs of war" for coming within the lines and burning a United States steamboat and other property. G. C. M. O. No. 107, April 18, 1866.

Soldiers and officers "now or late of the Confederate Army", were tried and convicted by military commission for "being secretly within the lines of the United States forces", James Hamilton, Dept. of the Ohio, G. O. No. 153, Sept. 18, 1863; for "recruiting men within the lines", Daniel Davis, G. O. No. 397, Dec. 18, 1863, and William F. Corbin and T. G. McGraw, G. O. No. 114, May 4, 1863; and for "lurking about the posts, quarters, fortifications and encampments of the armies of the United States", although not "as a spy", Augustus A. Williams, Middle Dept., G. O. No. 34, May 5, 1864. For other cases of violations of the law of war punished by military commissions during the Civil War see 2 Winthrop, Military Laws and Precedents (2d ed. 1896) 1310-11.

[11] See also Paragraph 100: "A messenger or agent who attempts to steal through the territory occupied by the enemy to further in any manner the interests of the enemy, if captured, is not entitled to the privileges of the prisoner of war, and may be dealt with according to the circumstances of the case."

Compare Paragraph 101.

visions have been continued in substance by the Rules of Land Warfare promulgated by the War Department for the guidance of the Army. Rules of 1914, Par. 369-77; Rules of 1940, Par. 345-57. Paragraph 357 of the 1940 Rules provides that "All war crimes are subject to the death penalty although a lesser penalty may be imposed". Paragraph 8 (1940) divides the enemy population into "armed forces" and "peaceful population", and Paragraph 9 names as distinguishing characteristics of lawful belligerents that they "carry arms openly" and "have a fixed distinctive emblem". Paragraph 348 declares that "persons who take up arms and commit hostilities" without having the means of identification prescribed for belligerents are punishable as "war criminals". Paragraph 351 provides that "men and bodies of men, who, without being lawful belligerents" "nevertheless commit hostile acts of any kind" are not entitled to the privileges of prisoners of war if captured and may be tried by military commission and punished by death or lesser punishment. And Paragraph 352 provides that "armed prowlers . . . or persons of the enemy territory who steal within the lines of the hostile army for the purpose of robbing, killing, or of destroying bridges, roads or canals, of robbing or destroying the mail, or of cutting the telegraph wires, are not entitled to be treated as prisoners of war". As is evident from reading these and related Paragraphs 345-347, the specified violations are intended to be only illustrative of the applicable principles of the common law of war, and not an exclusive enumeration of the punishable acts recognized as such by that law. The definition of lawful belligerents by Paragraph 9 is that adopted by Article 1, Annex to Hague Convention No. IV of October 18, 1907, to which the United States was a signatory and which was ratified by the Senate in 1909. 36 Stat. 2295. The preamble to the Convention declares:

"Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."

Our Government, by thus defining lawful belligerents entitled to be treated as prisoners of war, has recognized that there is a

class of unlawful belligerents not entitled to that privilege, including those who though combatants do not wear "fixed and distinctive emblems". And by Article 15 of the Articles of War Congress has made provision for their trial and punishment by military commission, according to "the law of war".

By a long course of practical administrative construction by its military authorities, our Government has likewise recognized that those who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants punishable as such by military commission. This precept of the law of war has been so recognized in practice both here and abroad, and has so generally been accepted as valid by authorities on international law[12] that we think it must be regarded as a rule or principle of the law of war recognized by this Government by its enactment of the Fifteenth Article of War.

Specification 1 of the first charge is sufficient to charge all the petitioners with the offense of unlawful belligerency, trial of which is within the jurisdiction of the Commission, and the admitted facts affirmatively show that the charge is not merely colorable or without foundation.

Specification 1 states that petitioners "being enemies of the United States and acting for . . . the German Reich, a belligerent

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[12] Great Britain, War Office, Manual of Military Law (1929) § 445, lists a large number of acts which, when committed within enemy lines by persons in civilian dress associated with or acting under the direction of enemy armed forces, are "war crimes". The list includes: "damage to railways, war material, telegraph, or other means of communication, in the interest of the enemy. . . ." Section 449 states that all "war crimes" are punishable by death.

Authorities on International Law have regarded as war criminals such persons who pass through the lines for the purpose of (a) destroying bridges, war materials, communication facilities etc.; 2 Oppenheim, International Law (6th ed. 1940) § 255; Spaight, Air Power and War Rights (1924) 233; Spaight, War Rights on Land (1911) 110; Phillipson, International Law and the Great War (1915) 208; Liszt, Das Völkerrecht (12 ed. 1925), § 58(B)4; (b) carrying messages secretly: Hall, International Law (8th ed. 1924) § 188; Spaight, War Rights on Land 215; 3 Merignhac, Droit Public International (1912) 296-97; Bluntschli, Droit International Codifié (5th ed. tr. Lardy) § 639; 4 Calvo, Le Droit International Theorique et Pratique (5th ed. 1896) § 2119; (c) ~~for~~ any hostile ~~purpose~~: 2 Winthrop, Military Law and Precedents, (2nd ed. 1896) 1224. Cf. Lieber, Guerrilla Parties (1862), 2 Miscellaneous Writings (1881) 288.

These authorities are unanimous in stating that a soldier in uniform who commits the acts mentioned would be entitled to treatment as a prisoner of war; it is the absence of uniform that renders the offender liable to trial for violation of the laws of war.

enemy nation, secretly and covertly passed, in civilian dress, contrary to the law of war, through the military and naval lines and defenses of the United States . . . and went behind such lines, contrary to the law of war, in civilian dress . . . for the purpose of committing . . . hostile acts, and, in particular, to destroy certain war industries, war utilities and war materials within the United States".

This specification so plainly alleges violation of the law of war as to require but brief discussion of petitioners' contentions. As we have seen, entry upon our territory in time of war by enemy belligerents, including those acting under the direction of the armed forces of the enemy, for the purpose of destroying property used or useful in prosecuting the war, is a hostile and warlike act. It subjects those who participate in it without uniform to the punishment prescribed by the law of war for unlawful belligerents. It is without significance that petitioners were not alleged to have borne conventional weapons or that their proposed hostile acts did not necessarily contemplate collision with the Armed Forces of the United States. Paragraphs 351 and 352 of the Rules of Land Warfare, already referred to, plainly contemplate that the hostile acts and purposes for which unlawful belligerents may be punished are not limited to assaults on the Armed Forces of the United States. Modern warfare is directed at the destruction of enemy war supplies and the implements of their production and transportation quite as much as at the armed forces. Every consideration which makes the unlawful belligerent punishable is equally applicable whether his objective is the one or the other. The law of war cannot rightly treat those agents of enemy armies who enter our territory, armed with explosives intended for the destruction of war industries and supplies, as any the less belligerent enemies than are agents similarly entering for the purpose of destroying fortified places or our Armed Forces. By passing our boundaries for such purposes without uniform or other emblem signifying their belligent status, or by discarding that means of identification after entry, such enemies become unlawful belligerents subject to trial and punishment.

Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on

hostile acts are enemy belligerents within the meaning of the Hague Convention and the law of war. Cf. *Gates* v. *Goodloe*, 101 U. S. 612, 615, 617-18. It is as an enemy belligerent that petitioner Haupt is charged with entering the United States, and unlawful belligerency is the gravamen of the offense of which he is accused.

Nor are petitioners any the less belligerents if, as they argue, they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations. The argument leaves out of account the nature of the offense which the Government charges and which the Act of Congress, by incorporating the law of war, punishes. It is that each petitioner, in circumstances which gave him the status of an enemy belligerent, passed our military and naval lines and defenses or went behind those lines, in civilian dress and with hostile purpose. The offense was complete when with that purpose they entered—or, having so entered, they remained upon—our territory in time of war without uniform or other appropriate means of identification. For that reason, even when committed by a citizen, the offense is distinct from the crime of treason defined in Article III, § 3 of the Constitution, since the absence of uniform essential to one is irrelevant to the other. Cf. *Morgan* v. *Devine*, 237 U. S. 632; *Albrecht* v. *United States*, 273 U. S. 1, 11-12.

But petitioners insist that even if the offenses with which they are charged are offenses against the law of war, their trial is subject to the requirement of the Fifth Amendment that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, and that such trials by Article III, § 2, and the Sixth Amendment must be by jury in a civil court. Before the Amendments, § 2 of Article III, the Judiciary Article, had provided: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury", and had directed that "such Trial shall be held in the State where the said Crimes shall have been committed".

Presentment by a grand jury and trial by a jury of the vicinage where the crime was committed were at the time of the adoption of the Constitution familiar parts of the machinery for criminal trials in the civil courts. But they were procedures unknown to military tribunals, which are not courts in the sense of the Judiciary Article, *Ex parte Vallandigham*, 1 Wall. 243;

*In re Vidal*, 179 U. S. 126; cf. *Williams* v. *United States*, 289 U. S. 553, and which in the natural course of events are usually called upon to function under conditions precluding resort to such procedures. As this Court has often recognized, it was not the purpose or effect of § 2 of Article III, read in the light of the common law, to enlarge the then existing right to a jury trial. The object was to preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law and in all cases of a like nature as they might arise in the future, *District of Columbia* v. *Colts*, 282 U. S. 63, but not to bring within the sweep of the guaranty those cases in which it was then well understood that a jury trial could not be demanded as of right.

The Fifth and Sixth Amendments, while guaranteeing the continuance of certain incidents of trial by jury which Article III, § 2 had left unmentioned, did not enlarge the right to jury trial as it had been established by that Article. *Callan* v. *Wilson*, 127 U. S. 540, 549. Hence petty offenses triable at common law without a jury may be tried without a jury in the federal courts, notwithstanding Article III, § 2, and the Fifth and Sixth Amendments. *Schick* v. *United States*, 195 U. S. 65; *District of Columbia* v. *Clawans*, 300 U. S. 617. Trial by jury of criminal contempts may constitutionally be dispensed with in the federal courts in those cases in which they could be tried without a jury at common law. *Ex parte Terry*, 128 U. S. 289, 302-04; *Savin, Petitioner*, 131 U. S. 267, 277; *In re Debs*, 158 U. S. 564, 594-96; *United States* v. *Shipp*, 203 U. S. 563, 572; *Blackmer* v. *United States*, 284 U. S. 421, 440; *Nye* v. *United States*, 313 U. S. 33, 48; see *United States* v. *Hudson and Goodwin*, 7 Cranch, 32, 34. Similarly, an action for debt to enforce a penalty inflicted by Congress is not subject to the constitutional restrictions upon criminal prosecutions. *United States* v. *Zucker*, 161 U. S. 475; *United States* v. *Regan*, 232 U. S. 37 and cases cited.

All these are instances of offenses committed against the United States, for which a penalty is imposed, but they are not deemed to be within Article III, § 2 or the provisions of the Fifth and Sixth Amendments relating to "crimes" and "criminal prosecutions". In the light of this long-continued and consistent interpretation we must conclude that § 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commission, or to have required that offenses against the law of war not triable by jury at common law be tried only in the civil courts.

The fact that "cases arising in the land or naval forces" are excepted from the operation of the Amendments does not militate against this conclusion. Such cases are expressly excepted from the Fifth Amendment, and are deemed excepted by implication from the Sixth. *Ex parte Milligan, supra,* 123, 138-39. It is argued that the exception, which excludes from the Amendment cases arising in the armed forces, has also by implication extended its guaranty to all other cases; that since petitioners, not being members of the Armed Forces of the United States, are not within the exception, the Amendment operates to give to them the right to a jury trial. But we think this argument misconceives both the scope of the Amendment and the purpose of the exception.

We may assume, without deciding, that a trial prosecuted before a military commission created by military authority is not one "arising in the land . . . forces", when the accused is not a member of or associated with those forces. But even so, the exception cannot be taken to affect those trials before military commissions which are neither within the exception nor within the provisions of Article III, § 2, whose guaranty the Amendments did not enlarge. No exception is necessary to exclude from the operation of these provisions cases never deemed to be within their terms. An express exception from Article III, § 2, and from the Fifth and Sixth Amendments, of trials of petty offenses and of criminal contempts has not been found necessary in order to preserve the traditional practice of trying those offenses without a jury. It is no more so in order to continue the practice of trying, before military tribunals without a jury, offenses committed by enemy belligerents against the law of war.

Section 2 of the Act of Congress of April 10, 1806, 2 Stat. 371, derived from the Resolution of the Continental Congress of August 21, 1776,[18] imposed the death penalty on alien spies "according to the law and usage of nations, by sentence of a general court martial". This enactment must be regarded as a contemporary construction of both Article III, § 2, and the Amendments as not foreclosing trial by military tribunals, without a jury, of offenses against the law of war committed by enemies not in or associated with our Armed Forces. It is a construction of the Constitution which has been followed since the founding of our

[18] See Morgan, Court-Martial Jurisdiction over Non-Military Persons under the Articles of War, 4 Minnesota L. Rev. 79, 107-09.

government, and is now continued in the 82nd Article of War. Such a construction is entitled to the greatest respect. *Stuart* v. *Laird*, 1 Cranch 299, 309; *Field* v. *Clark*, 143 U. S. 649, 691; *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 328. It has not hitherto been challenged, and so far as we are advised it has never been suggested in the very extensive literature of the subject that an alien spy, in time of war, could not be tried by military tribunal without a jury.[14]

The exception from the Amendments of "cases arising in the land or naval forces" was not aimed at trials by military tribunals, without a jury, of such offenses against the law of war. Its objective was quite different—to authorize the trial by court martial of the members of our Armed Forces for all that class

[14] In a number of cases during the Revolutionary War enemy spies were tried and convicted by military tribunals: (1) Major John Andre, Sept. 29, 1780, see note 9 *supra*. (2) Thomas Shanks was convicted by a "Board of General Officers" at Valley Forge on June 3, 1778, for "being a Spy in the Service of the Enemy" and sentenced to be hanged. 12 Writings of Washington (Bicentennial Comm'n ed.) 14. (3) Matthias Colbhart was convicted of "holding a Correspondence with the Enemy" and "living as a Spy among the Continental Troops" by a General Court Martial convened by order of Major General Putnam on Jan. 13, 1778; General Washington, the Commander in Chief, ordered the sentence of death to be executed, 12 *Id.* 449-50. (4) John Clawson, Ludwick Lasick, and William Hutchinson were convicted of "lurking as spies in the Vicinity of the Army of the United States" by a General Court Martial held on June 18, 1780. The death sentence was confirmed by the Commander in Chief. 19 *Id.* 23. (5) David Farnsworth and John Blair were convicted of "being found about the Encampment of the United States as Spies" by a Division General Court Martial held on Oct. 8, 1778 by order of Major General Gates. The death sentence was confirmed by the Commander in Chief. 13 *Id.* 139-40. (6) Joseph Bettys was convicted of being "a Spy for General Burgoyne" by coming secretly within the American lines, by a General Court Martial held on April 6, 1778 by order of Major General McDougall. The death sentence was confirmed by the Commander in Chief. 15 *Id.* 364. (7) Stephen Smith was convicted of "being a Spy" by a General Court Martial held on Jan. 6, 1778. The death sentence was confirmed by Major General McDougall. *Ibid.* (8) Nathaniel Aherly and Reuben Weeks, Loyalist soldiers, were sentenced to be hanged as spies. Proceedings of a General Court Martial Convened at West Point According to a General Order of Major General Arnold, Aug. 20-21, 1780 (National Archives, War Dept., Revolutionary War Records, MS No. 31521). (9) Jonathan Loveberry, a Loyalist soldier, was sentenced to be hanged as a spy, Proceedings of a General Court Martial Convened at the Request of Major General Arnold at the Township of Bedford, Aug. 30-31, 1780 (*Id.* MS No. 31523); he later escaped, 20 Writings of Washington 253n. (10) Daniel Taylor, a lieutenant in the British Army, was convicted as a spy by a general court martial convened on Oct. 14, 1777, by order of Brigadier General George Clinton, and was hanged. 2 Public Papers of George Clinton (1900) 443. (11) James Molesworth was convicted as a spy and sentenced to death by a general court martial, held at Philadelphia, March 29, 1777; Congress confirmed the order of Major General Gates for the execution of the sentence. 7 Journals of the Continental Congress 210. See also cases of

of crimes which under the Fifth and Sixth Amendments might otherwise have been deemed triable in the civil courts. The cases mentioned in the exception are not restricted to those involving offenses against the law of war alone, but extend to trial of all offenses, including crimes which were of the class traditionally triable by jury at common law. *Ex parte Mason*, 105 U. S. 696; *Kahn* v. *Anderson*, 255 U. S. 1, 8-9; *cf. Caldwell* v. *Parker*, 252 U. S. 376.

Since the Amendments, like § 2 of Article III, do not preclude all trials of offenses against the law of war by military commission without a jury when the offenders are aliens not members of our Armed Forces, it is plain that they present no greater obstacle to the trial in like manner of enemy citizens who have violated the law of war applicable to enemies. Under the original statute authorizing trial of alien spies by military tribunals, the offenders were outside the constitutional guaranty of trial by jury, not because they were aliens but only because they had violated the law of war by committing offenses constitutionally triable by military tribunal.

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"M. A." and "D. C.", G. O. Headquarters of General Sullivan, Providence, R. I., July 24, 1778, reprinted in Niles, Principles and Acts of the Revolution (1822) 369; of Lieutenant Palmer, 9 Writings of Washinton, 56n; of Daniel Strang, 6 *Id.* 497n; of Edward Hicks, 14 *Id.* 357; of John Mason and James Ogden, executed as spies near Trenton, N. J., on Jan. 10, 1781, mentioned in Hatch, Administration of the American Revolutionary Army (1904) 135 and Van Doren, Secret History of the American Revolution (1941) 410.

During the War of 1812, William Baker was convicted as a spy and sentenced to be hanged by a general court martial presided over by Brigadier General Thomas A. Smith at Plattsburg, N. Y., on March 25, 1814. (National Archives, War Dept., Judge Advocate General's Office, Records of Courts Martial, MS No. O-13). William Utley, tried as a spy by a court martial held at Plattsburg, March 3-5, 1814, was acquitted (*Id.*, MS No. X-161). Elijah Clark was convicted as a spy, and sentenced to be hanged, by a general court martial held at Buffalo, N. Y., Aug. 5-8, 1812; he was ordered released by President Madison on the ground that he was an American citizen. Military Monitor, Vol. I, No. 23, Feb. 1, 1813, pp. 121-122; Maltby, Treatise on Courts Martial and Military Law (1813) 35-36.

In 1862 Congress amended the spy statute to include "all persons" instead of only aliens. 12 Stat. 339, 340; see also 12 Stat. 731, 737. For the legislative history, see Morgan, Court-Martial Jurisdiction over Non-Military Persons under the Articles of War, 4 Minnesota L. Rev. 79, 109-11. During the Civil War a number of Confederate officers and soldiers found within the Union lines in disguise were tried and convicted by military commission for being spies. Charles H. Clifford, G. O. No. 135, May 18, 1863; William S. Waller, G. O. No. 269, Aug. 4, 1863; Alfred Yates and George W. Casey, G. O. No. 382, Nov. 28, 1863; James R. Holton and James Taylor, G. C. M. O. No. 93, May 13, 1864; James McGregory, G. C. M. O. No. 152, June 4, 1864; E. S. Dodd, Dept. of Ohio, G. O. No. 3, Jan. 5, 1864. For other cases of spies tried by military commission see 2 Winthrop, Military Law and Precedents, 1193 *et seq.*

We cannot say that Congress in preparing the Fifth and Sixth Amendments intended to extend trial by jury to the cases of alien or citizen offenders against the law of war otherwise triable by military commission, while withholding it from members of our own armed forces charged with infractions of the Articles of War punishable by death. It is equally inadmissible to construe the Amendments—whose primary purpose was to continue unimpaired presentment by grand jury and trial by petit jury in all those cases in which they had been customary—as either abolishing all trials by military tribunals, save those of the personnel of our own armed forces, or what in effect comes to the same thing, as imposing on all such tribunals the necessity of proceeding against unlawful enemy belligerents only on presentment and trial by jury. We conclude that the Fifth and Sixth Amendments did not restrict whatever authority was conferred by the Constitution to try offenses against the law of war by military commission, and that petitioners, charged with such an offense not required to be tried by jury at common law, were lawfully placed on trial by the Commission without a jury.

Petitioners, and especially petitioner Haupt, stress the pronouncement of this Court in the *Milligan* case, p. 121, that the law of war "can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed". Elsewhere in its opinion, at pp. 118, 121-22 and 131, the Court was at pains to point out that Milligan, a citizen twenty years resident in Indiana, who had never been a resident of any of the states in rebellion, was not an enemy belligerent either entitled to the status of a prisoner of war or subject to the penalties imposed upon unlawful belligerents. We construe the Court's statement as to the inapplicability of the law of war to Milligan's case as having particular reference to the facts before it. From them the Court concluded that Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war save as—in circumstances found not there to be present and not involved here—martial law might be constitutionally established.

The Court's opinion is inapplicable to the case presented by the present record. We have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of

military tribunals to try persons according to the law of war. It is enough that petitioners here, upon the conceded facts, were plainly within those boundaries, and were held in good faith for trial by military commission, charged with being enemies who, with the purpose of destroying war materials and utilities, entered or after entry remained in our territory without uniform—an offense against the law of war. We hold only that those particular acts constitute an offense against the law of war which the Constitution authorizes to be tried by military commission.

Since the first specification of Charge I set forth a violation of the law of war, we have no occasion to pass on the adequacy of the second specification of Charge I, or to construe the 81st and 82nd Articles of War for the purpose of ascertaining whether the specifications under Charges II and III allege violations of those Articles or whether if so construed they are constitutional. *McNally* v. *Hill*, 293 U. S. 131.

There remains the contention that the President's Order of July 2, 1942, so far as it lays down the procedure to be followed on the trial before the Commission and on the review of its findings and sentence, and the procedure in fact followed by the Commission, are in conflict with Articles of War 38, 43, 46, 50½ and 70. Petitioners argue that their trial by the Commission, for offenses against the law of war and the 81st and 82nd Articles of War, by a procedure which Congress has prohibited would invalidate any conviction which could be obtained against them and renders their detention for trial likewise unlawful (see *McClaughry* v. *Deming*, 186 U. S. 49; *United States* v. *Brown*, 206 U. S. 240, 244; *Runkle* v. *United States*, 122 U. S. 543, 555-56; *Dynes* v. *Hoover*, 20 How. 65, 80-81); that the President's Order prescribes such an unlawful procedure; and that the secrecy surrounding the trial and all proceedings before the Commission, as well as any review of its decision, will preclude a later opportunity to test the lawfulness of the detention.

Petitioners do not argue and we do not consider the question whether the President is compelled by the Articles of War to afford unlawful enemy belligerents a trial before subjecting them to discliplinary measures. Their contention is that, if Congress has authorized their trial by military commission upon the charges preferred—violations of the law of war and the 81st and 82nd Articles of War—it has by the Articles of War prescribed the

procedure by which the trial is to be conducted; and that since the President has ordered their trial for such offenses by military commission, they are entitled to claim the protection of the procedure which Congress has commanded shall be controlling.

We need not inquire whether Congress may restrict the power of the Commander in Chief to deal with enemy belligerents. For the Court is unanimous in its conclusion that the Articles in question could not at any stage of the proceedings afford any basis for issuing the writ. But a majority of the full Court are not agreed on the appropriate grounds for decision. Some members of the Court are of opinion that Congress did not intend the Articles of War to govern a Presidential military commission convened for the determination of questions relating to admitted enemy invaders and that the context of the Articles makes clear that they should not be construed to apply in that class of cases. Others are of the view that—even though this trial is subject to whatever provisions of the Articles of War Congress has in terms made applicable to "commissions"—the particular Articles in question, rightly construed, do not foreclose the procedure prescribed by the President or that shown to have been employed by the Commission, in a trial of offenses against the law of war and the 81st and 82nd Articles of War, by a military commission appointed by the President.

Accordingly, we conclude that Charge I, on which petitioners were detained for trial by the Military Commission, alleged an offense which the President is authorized to order tried by military commission; that his Order convening the Commission was a lawful order and that the Commission was lawfully constituted; that the petitioners were held in lawful custody and did not show cause for their discharge. It follows that the orders of the District Court should be affirmed, and that leave to file petitions for habeas corpus in this Court should be denied.

Mr. Justice MURPHY took no part in the consideration or decision of these cases.